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No. 07-354

IN THE

# Supreme Court of the United States

HOULTON BAND OF MALISEET INDIANS, PETITIONER

*v.*

PATRICIA E. RYAN, EXECUTIVE DIRECTOR, MAINE HUMAN RIGHTS COMMISSION; MAINE HUMAN RIGHTS COMMISSION MEMBERS; G. STEVEN ROWE, ATTORNEY GENERAL OF THE STATE OF MAINE; CONNIE ZETTS

*PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT*

## PETITION FOR WRIT OF CERTIORARI

DENNIS P. DERRICK

*7 Winthrop Street*
*Essex, MA 01929-1203*
*(978) 768-6610*

DOUGLAS J. LUCKERMAN
*Counsel of Record*

*20 Outlook Drive*
*Lexington, MA 02421*
*781-861-6535*

*Attorneys for Petitioners*

CURRY & TAYLOR • WASH D.C. • (202) 393-4141 • USSCINFO.COM

## QUESTIONS PRESENTED

1. Does denying the Houlton Band of Maliseet Indians the inherent sovereign right to govern their internal tribal affairs because of language in the 1980 Maine Indian Claims Settlement Act ignore federal common law establishing this sovereign right, disregard this Court's decisions to the same effect and usurp the very tribal rights which Congress acknowledged when it passed the Act?

2. Where Congress has not expressly provided otherwise and following the logic of this Court's decision in *Montana v. United States*, 450 U.S. 544(1981), is the Maliseet tribal government instead of a State administrative agency the proper forum to determine a workplace discrimination claim against the tribe by its nonmember employee arising from her consensual employment on tribal lands?

3. Is the ruling below at odds with those courts of appeals which recognize that a federally recognized tribe like the Maliseet, absent an explicit contrary directive by Congress, retains the inherent tribal right of self-government and the right to decide workplace discrimination claims by its nonmember employee arising from her consensual employment on tribal lands?

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## OPINIONS BELOW

The published decision of the United States Court of Appeals for the First Circuit in the case of *Houlton Band of Maliseet Indians v. Patricia E. Ryan et al.*, Docket No. 06-1774, reported at 484 F.3rd 73, 2007 U.S. App. LEXIS 8711, and filed April 17, 2007, affirming a decision by the United States District Court for the District of Maine which acting on the recommended decision of the U.S. Magistrate Judge dismissed the Band's civil action seeking to enjoin the Maine Human Rights Commission from acting on discrimination complaints brought against the tribe by its former employee, is set forth in the Appendix hereto(App.1-4).

The published decision of the United States District Court for the District of Maine in the case of *Houlton Band of Maliseet Indians v. Patricia E. Ryan et al.*, Docket No. CV-05-180-B-W, reported at 2006 WL 897660, and filed April 6, 2006, affirming the recommended decision of the U.S. Magistrate Judge dismissing the Band's civil action seeking to enjoin the Maine Human Rights Commission from acting on discrimination complaints brought against the Band by its former employee, is set forth in the Appendix hereto(App.5-7).

The unpublished and unreported recommended decision of the U.S. Magistrate Judge for the District of Maine granting the respondents' motions to dismiss the Band's civil action seeking to enjoin the Maine Human Rights Commission from acting on discrimination complaints brought against the Band by its former employee, is set forth in the Appendix hereto(App.8-40).

The published decision of the United States Court of Appeals for the First Circuit in the companion case of *Aroostook Band of Micmacs v. Patricia E. Ryan et al.*, Docket Nos. 06-1127 & 06-1358, reported at 484 F.3rd 41, 2007 U.S. App. LEXIS 8710, and filed April 17, 2007, reversing a decision by the U.S. Magistrate which enjoined the Maine Human Rights Commission from acting on discrimination complaints brought against the Micmacs by its former employees, is set forth in the Appendix hereto(App.41-109).

## JURISDICTION

The decision of the United States Court of Appeals for the First Circuit affirming a decision by the U.S. District Court for the District of Maine which dismissed the Band's civil action seeking to enjoin the Maine Human Rights Commission from acting on discrimination complaints brought against the tribe by its former employee, was entered on April 17, 2007. On or about June 20, 2007, the petitioner timely applied to Justice Souter of this Court for an extension of time to file its petition for certiorari(Docket No. 07A3). On July 2, 2007, Justice Souter of this Court granted the petitioner's motion, extending the time to file this petition for certiorari until September 14, 2007.

This petition for writ of certiorari is filed within the time limits prescribed by Justice Souter's order in Docket No. 07A3, allowing the petitioner's application for an extension of time to file this petition.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

**RELEVANT PROVISIONS INVOLVED** (see appendix)

## STATEMENT

Until 1819, Maine was a district of Massachusetts and as a result of agreements between the Commonwealth of Massachusetts and the Maine Indian tribes as well as the outright appropriation of tribal lands by settlers, much of the aboriginal land of these Maine tribes was lost. Since 1820, the State of Maine provided various services to the tribes living within its borders, including the Passamaquoddy Tribe, the Penobscot Nation, the Aroostook Band of Micmacs and the petitioner Houlton Band of the Maliseet Indians ("the petitioner," "the Band" or "the Maliseet"). The federal government, however, refused to provide any services, denying that it had jurisdiction over these tribes. See 25 U.S.C. §1721(a)(9). Until the 1970's, the State of Maine and its courts considered the Indian tribes located there to be "as completely subject to...state [law] as any other inhabitants can be." *State v. Newell*, 24 A. 943, 944(Me.1892).

In the early1970's, however, the Passamaquoddy Tribe filed suit in federal court claiming much of the land in Maine, arguing that its earlier agreements with Massachusetts ceding its territory were invalid because they were never approved by Congress. After it was found that the federal government was obligated to represent the tribe in its land claim against Maine in *Joint Tribal Council of Passamaquoddy Tribe v. Morton*, 528 F.2d 370, 379-380(1st Cir. 1975), and after the federal authorities interceded, the Passamaquoddy Tribe and the Penobscot Nation in 1979 entered into settlement negotiations with Maine in an effort to resolve their land

claims. The State refused to acknowledge or bargain with the "so-called tribe" of the Houlton Band of the Maliseet Indians.

The result of negotiations between the State and these two tribes was the Maine Indian Claims Settlement Act, 30 MRSA §§ 6201-6214, enacted in 1980("the State Implementing Act"). Under its terms, the two tribes withdrew their land claims in return for a cash payment, the State's grant of certain land in trust reserved for their benefit, their eligibility for State financial assistance and the State's acknowledgment that while subject to State law, these two tribes could nevertheless exercise apart from any State law the right of tribal self-government, i.e., the power to decide in their own tribal fora the rights and duties of tribe members arising from conduct on tribal lands.

As to the State's recognition of the right to tribal self-government, 30 MRSA § 6206.1 provides that:

> ...internal tribal matters [of the Passamaquoddy Tribe and the Penobscot Nation], including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.

Even though the State refused to bargain with or even acknowledge the Maliseet over the terms of the settlement or the language of the State Implementing Act , it nonetheless unilaterally included the Maliseet within the Act's terms. Thus it was provided that while

"the Passamaquoddy Tribe and the Penobscot Nation...agreed to adopt the laws of the State as their own to the extent provided in this Act[,] the Houlton Band of Maliseet Indians and its lands *will be wholly subject to the laws of the State of Maine.*" *Id.* at § 6202(emphasis supplied).

In addition, 30 MRSA § 6204 provides that

> [e]xcept as otherwise provided in this Act, *all* Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State to the same extent as any other person or lands or other natural resources therein.(emphasis supplied).

After negotiations over the terms of this settlement ended, the Maliseet entered into an agreement with the Passamaquoddy Tribe and the Penobscot Nation to be included within the anticipated federal legislation ratifying the State Implementing Act, necessary legislation since Congress has the plenary power to limit the sovereign rights of Indians, Indian tribes or Indian bands.

Soon after the State Implementing Act became law in 1980, Congress enacted in the same year the Maine Indian Claims Settlement Act, 25 U.S.C. §§ 1721-1735("the 1980 Federal Act"). One of its purposes was to ratify the state Implementing Act and to "confirm that all other Indians, Indian nations and tribes and bands of Indians [besides the Passamaquoddy Tribe and the

Penobscot Nation] now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein." 25 U.S.C. §§ 1721(b)(3)-(4);1725(b)(1).

Moreover, the 1980 Federal Act made clear that all Indians, Indian tribes and bands of Indians other than the members of the Passamaquoddy Tribe or the Penobscot Nation

> shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

25 U.S.C. § 1725(a). The tribal courts of the Passamaquoddy Tribe and the Penobscot Nation were given the same jurisdiction to hear civil and criminal matters involving tribal members as given them by the State Implementing Act. 25 U.S.C. § 1725(b)(1). See 30 MRSA §§ 6209-A;6209-B.

There were no provisions in the 1980 Federal Act addressing the jurisdiction of the Maliseet Indians to hear and decide civil or criminal matters involving their own tribal members. However, the 1980 Federal Act explicitly recognizes the Houlton Band of Maliseet Indians as a sovereign political entity entitled to all of the rights appurtenant thereto and acknowledged that, contrary to prior law when these three Indian groups were "as completely subject to...state [law] as any other inhabitants can be," *State v. Newell*, 24 A. at 944, they now have the right to govern and decide their internal tribal matters by resort to their own tribal government

fora:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument...must be consistent with the terms of this subchapter and any amend..ients thereto....

25 U.S.C. § 1726(a). Finally, if there was a conflict between the 1980 Federal Act and the State Implementing Act, the 1980 Federal Act governs. 25 U.S.C. § 1735.

The legislative history of the 1980 Federal Act shows that the Act is a compromise "in which state authority is extended over Indian territory to the extent provided in the [State] Implementing Act[;] the settlement provides that henceforth the tribes will be free from state interference in the exercise of their internal affairs...[and] that rather than destroying the sovereignty of the tribes, by recognizing their power to control their internal affairs,...the settlement strengthens the sovereignty of the Maine tribes." S. Rep. No. 96-957 at 14; H.R. No. 96-1353 at 14-15, reproduced at 1980 U.S. Cong. & Adm. News at 3790.

Another Maine tribe which did not participate in negotiations with the State over the terms of the State Implementing Act or the1980 Federal Act was the Aroostook Band of Micmacs ("the Micmacs"), a tribe which eventually became the plaintiffs in the companion case to this one entitled *Aroostook Band of Micmacs v.*

*Patricia E. Ryan et al.*, 484 F.3rd 41(1st Cir. 2007)(App. 41-109). Having called northern Maine their home since at least the early 1600's, the Micmacs believed that they would be included in the terms of the settlement but were not. Its members, although then not federally recognized as a Band, asserted their own land claims against the State of Maine in the 1980's and as a result of negotiations between the Band and the State, Maine enacted in 1989 the Micmac Settlement Act, 30 MRSA §§ 7201-7207("the State Micmac Act").

The State Micmac Act provided that it would become law only if its Tribal Council certified its agreement within 60 days of the legislature's adjournment and if analogous federal legislation ratifying the Act without modification was forthcoming from Congress. In addition, it made the Micmacs, like the Maliseet, subject to "the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person...," and that they could "not...exercise civil or criminal jurisdiction within their lands prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers." 30 MRSA §§ 7203;7205. The Tribal Council of the Micmacs, however, never certified its agreement with its provisions and the State Micmac Act *never* became law in the State of Maine.

Nevertheless, on November 21, 1991, Congress enacted the Aroostook Band of Micmacs Settlement Act ("the Federal Micmac Act"), set out as a note under 25 U.S.C. § 1721. Its provisions amounted to federal recognition of the Band; explained that the Micmacs were not included in the earlier 1980 Federal Act due to lack of documentation, an omission now corrected; and that they

now should be afforded the same settlement as the one provided the Maliseet in the earlier 1980 Federal Act. *Id.* at §2(a)(4);(5). On this basis, Congress ratified the [State] Micmac Act "which defines the relationship between the State of Maine and the...Micmacs." *Id.*

Section 7(a) of the Federal Micmac Act further acknowledges the Micmacs' self-government and despite its aspiration to treat the Micmacs like the Maliseet, the Act contains *no* provision subjecting the Micmacs to State law. Instead, § 6(b) of the Federal Micmac Act, entitled "Laws Applicable," subjects the Band only to *federal* law on the same terms as the other Maine tribes. Finally, § 11 of the Act makes its provisions govern any conflict between its terms and those in the State Implementing Act, the 1980 Federal Act or the State Micmac Act.

With these events as background, the Maliseet in 2004 employed the respondent Connie Zetts in its health clinic as an LPN and phlebotomist(App. 20). In August of 2005, after Zetts' prolonged absence from work without cause, the Band discharged her(*Id.*). Rather than pursue a grievance by resort to the procedure set up by the Band's Tribal Council, Zetts filed with the State's Human Rights Commission a charge of workplace discrimination against the Band alleging violations of the Maine Human Rights Act(MHRA), 5 MRSA §§ 4551-4634, and Title VII of the Civil Rights Act of 1964(*Id.*).

On October 28, 2005, the State's Human Rights Commission opened a preliminary investigation and demanded in writing that the Band submit an extensive reply including document production(*Id.*). In order to stop this investigation, the Band filed suit in the federal district court for the District of Maine against the

respondents(App. 20-22).

Invoking jurisdiction under 28 U.S.C. § 1331, the Maliseet claimed in Count I that the Commission's investigation "interferes with [its] inherent sovereignty [protected by federal common law] and the statutory right of self governance"(App. 20). As the Band alleged, a tribe's inherent sovereignty includes the rights of Indians to make their own laws and to live by them, absent abrogation by Congress(App. 20-21). In furtherance of § 1726(a) of the 1980 Federal Act acknowledging the tribe's right of self-government, the Band alleged that it had established a process to address grievances arising from the hiring and firing of its employees, matters particularly within the ambit of the tribe's right to self-government and its inherent sovereignty(*Id.*).

In Count II, the Band alleged that as a matter of federal law, its retained sovereign right of self-government bars the Commission's enforcement of the State's anti-discrimination laws against the tribe(App. 21-22). That is, even though under the State Implementing Act and the 1980 Federal Act the Band could sue and be sued in the state and federal courts, its immunity as a sovereign from a non-judicial, administrative hearing conducted by the Commission was not abrogated(*Id.*).

The magistrate judge in the district court considered the legal validity of the Band's claims on February 3, 2006, when she decided the respondents' motions to dismiss the Band's complaint (App. 8-40). She recommended that the motions be granted as she thought both counts were barred by the doctrine of claim preclusion inasmuch as the unappealed 1997 decision by Maine's federal district court in the case of *Houlton Band*

*of Maliseet v. Maine Human Rights Com.*, 960 F. Supp. 449, 453(D. Me.1997), foreclosed the Band from now claiming that the State Implementing Act together with the 1980 Federal Act did not operate to make the tribe subject to the jurisdiction of the Commission for unlawful employment discrimination(App.10-29)

In this earlier case, the district judge had analyzed the Band's sovereign immunity within the context of the State Implementing Act and the 1980 Federal Act(App.11-17). He concluded that:

> [i]t is indeed clear from the statutory language of the Maine Implementing Act and the [1980 Federal Act] that the Band is subject to the civil laws of the State and, therefore, to the jurisdiction of the MHRC for claims of unlawful employment discrimination.

(App. 14-15 quoting 960 F. Supp. at 453;454-455). Because the Maliseet were raising essentially the same claims in this suit, and since intervening decisions had not changed the legal landscape on these issues, the magistrate judge thought that this 1997 decision barred their relitigation now(App. 27-29). She recommended that the motions to dismiss be granted; the district judge did so(App.5-7;28-29).

The Band appealed and on April 17, 2007, the court of appeals unanimously affirmed the district court's dismissal(App.1-4). Two members of the court rested their decision on the opinion issued by the court the same day in *Aroostook Band of Micmacs v. Patricia E. Ryan et al.*, Docket Nos. 06-1127 & 06-1358, reported at 484 F.3rd 41(App. 3;41-109). Circuit Judge Lipez concurred

separately, affirming on the basis of preclusion principles(App. 4).

In *Aroostook Band of Micmacs, supra*, the court of appeals considered whether the State Implementing Act, 1980 Federal Act or the so-called 1991 Federal Micmac Act operated to insulate the Micmacs from the State Commission's investigation of workplace discrimination alleged by three of the tribe's employees in the wake of their discharge by the tribe. Despite the fact that the 1991 Federal Micmac Act formally recognized the Band as a federally protected Indian tribe which was entitled to govern itself as a political entity, federal recognition by the Congress which in no way conflicted with its earlier 1980 Federal Act, the majority did not think that this was sufficient proof that the Micmacs retained any inherent sovereign right to govern itself or to make its own employment decisions(App. 53-54).

Instead, the majority concluded that the 1980 Federal Act together with the Federal Micmac Act "displaced any federal common law that might otherwise bear on this dispute"(App. 53-54). As the majority saw it, § 1725(a) of the 1980 Federal Act makes clear that *all* Indians, Indian tribes and bands of Indians except members of the Passamaquoddy Tribe or the Penobscot Nation are subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State of Maine to the same extent as any other person; and the Federal Micmac Act did not either explicitly or implicitly conflict with or override the Federal Act on this point, instead reinforcing it(App. 53-54). The majority therefore thought that this "was enough" to justify the conclusion that state law including the MHRA and the state's whistleblower

protection law applies to the Band's decisions to discharge its employees(App. 63).

The majority rejected the Micmacs' argument that the 1980 Federal Act was not explicit enough to make State law override the Band's inherent authority to make its own decisions about its employees(App. 54- 63). The majority read the State Implementing Act as making the "internal tribal matters" *of only the Passamaquoddy Tribe and the Penobscot Nation* immune from state regulation, reinforcing its conclusion that under § 1725(a) of the 1980 Federal Act, the Micmacs' employment decision to terminate it employees there was not such an "internal tribal matter" insulated from State law(App. 63-64).

The majority also rejected the Micmacs' further contention that under federal common law, the internal tribal matters of *all* Indian groups are insulated from state law because of their inherent tribal sovereignty unless explicitly qualified by Congress, and it was therefore unnecessary for the 1980 Federal Act to state that principle explicitly in order for the Micmacs to have their internal tribal matters remain protected from regulation by the State(App. 63-65).

Relying upon these rulings in *Aroostook Band of Micmacs*, the court of appeals thus concluded that the 1980 Federal Act "allows Maine to enforce its employment discrimination laws against Maine tribes, including the [Maliseet]..."(App. 3). On July 2, 2007, Justice Souter of this Court granted the petitioner's motion, extending the time to file this petition for certiorari until September 14, 2007.

## REASONS FOR GRANTING THE PETITION

### 1. The Decision Below Usurps Congress's Intent To Preserve The Maliseet's Inherent Tribal Rights, Undermines The Decisional Law Of This Court Requiring Positive Statutory Language To Diminish The Tribe's Sovereignty And Nullifies The Inherent Sovereign Rights Congress Acknowledged In The Tribe To Govern Its Internal Affairs.

In *Morton v. Mancari*, 417 U.S. 535, 551-555 (1974), this Court held that an Indian tribe's strong interest in self-governance will prevent parties from asserting employment discrimination claims in any forum based on Indian preferences for jobs in the Bureau of Indian Affairs. *Id.* In *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 64-67(1978), the Court held that in order to protect tribal self-government, Indian tribunals are the exclusive fora to decide discrimination claims under the Indian Civil Rights Act of 1968. Moreover, in furtherance of the inherent sovereign rights of Indian tribes, Congress has expressly exempted Indian tribes from being defined as an "employer" under Title VII of the Civil Rights Act of 1964, nullifying state or federal regulation of workplace discrimination claims against tribes based upon race. See 42 U.S.C. §§ 2000e-(b) & e-(b)(2)(I).

These legal understandings have led almost all of the courts of appeals to formulate a so-called Tribal Employment Rule: absent a "clear and plain" intent by Congress' otherwise, an Indian tribe's decision to discharge a tribal or reservation-based employee whose job is related to the tribe's self-governance or its administration is an "intramural" matter exempt from

federal or state regulation. *Snyder v. Navaho Nation*, 382 F.3d 892, 895-896 (9th Cir. 2004)(tribal law enforcement officer). *Gallegos v. Jicarrella Apache Nation*, 97 Fed. Appx. 806, 811(10th Cir. 2003)(same). *Taylor v. Alabama Intertribal Council Title IV*, 261 F.3d 1032, 1035-1036(11th Cir. 2001)(non-Indian employee). *Fond du Lac Heavy Equip. & Constr. Co., Inc.*, 986 F.2d 246, 249(8th Cir. 1993)(same). Any other result would undermine a tribe's strong interest in self-governance,, i.e., to live on their own land and abide by their own enforceable rules of personal conduct.

The court of appeals for the First Circuit adopted this employment rule in *Penobscot Nation v. Fellencer*, 164 F.3d 706, 709-713(1st Cir. 1999), holding that the tribe there was not subject to a workplace discrimination claim under Maine law after discharging a non-Indian employee from the position of nurse in the tribe-run health center. *Id.* In reaching this result, the court reviewed the inherent sovereign rights retained by the tribe since the beginning of the republic, the nature and extent of Congress' statutory inroads into these retained tribal sovereign rights, and the special rules of statutory construction which attend a reading of the 1980 Federal Act authored by Congress. *Id.* See also *State of R.I. v. Narragansett Indian Tribe*, 19 F.3d 685, 694;701(1st Cir. 1994).

Like the employee in *Fellencer*, the discharged employee here worked for the tribal government in its health department, implicating the Band's strong interest in self-government, an interest explicitly furthered by Congress' recognition of the Maliseet in the 1980 Federal Act as a sovereign political entity with a government-to-government relationship with the Federal government.

Despite this, the court below abandoned its holding in *Fellencer*, rejecting any notion that the Maliseet retained the inherent tribal rights to self government or to make its own employment decisions. It disregarded this Court's canons of statutory construction in reading the 1980 Federal Act together with the State Implementing Act, canons which favor a recognition of the Band's inherent tribal rights, and concluded contrary to the federal common law developed by this Court that the1980 Federal Act results in the *complete destruction of all the Band's inherent sovereign rights, including the right to make employment decisions free of federal or State regulation.* This ruling is at odds with the decisions of this Court on every score.

### A. *The Lower Court Wrongly Extinguished The Tribe's Inherent Sovereign Rights.*

This Court has repeatedly made clear that Indian tribes occupy a unique status under our law. *National Farmers Union Ins. Cos. v. Crow Tribe*, 471 U.S. 845, 851(1985).The various tribes "were once independent and sovereign nations," self-governing political communities which existed long before the coming of the Europeans or the formation of our Government. *United States v. Wheeler*, 435 U.S. 313, 322-323(1978). *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. 164, 172-173 (1973). At one time, they exercised unlimited power over their members as well as those who were permitted to join their communities. *National Farmers Union Ins. Cos. v. Crow Tribe, supra.*

After Congress acted to protect the territorial and political rights of Indian tribes, this Court found that they no longer possessed the full attributes of

sovereignty which they had previously exercised. *Wheeler*, 435 U.S. at 323 quoting *United States v. Kagama*, 118 U.S. 375, 381 (1886). However, this Court has consistently held that Indian tribes have not given up *all* their sovereign rights. Regardless of their incorporation as a society into this Nation, Indian tribes remain a "separate people, with the power of regulating their internal and social relations." *Santa Clara Pueblo v. Martinez*, 436 U.S. 49, 55(1978) quoting *Kagama*, 118 U.S. at 381-382. *Wheeler, supra.*

Unless and until Congress provides otherwise, the tribes retain their right to self government, self sufficiency and economic development; and they possess the power to make their own substantive law concerning internal tribal matters, the very core of self government. *California v. Cabazon Band of Mission Indians*, 480 U.S. 202, 207(1987) ("retain[ed]... sovereignty"). *National Farmers Union Ins. Cos. v. Crow Tribe, supra*("retained...inherent powers"). *New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 332-334(1983)("sovereignty retained by tribes"). *White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 143(1980). *Wheeler*, 435 U.S. at 322-325("inherent powers of a limited sovereignty"). *McClanahan v. Arizona State Tax Comm'n*, 411 U.S. at 172 n.8("residual Indian sovereignty"). Contrast *United States v. Lara*, 541 U.S. 193, 214-223(2004)(Thomas, J., concurring) (questioning the constitutional basis for co-existing, competing sovereign powers).

The court below relied upon the1980 Federal Act to justify applying State law to the Band's discharge of its employee. But the only inherent tribal right which Congress addressed in the 1980 Federal Act was the

Band's sovereign immunity; *the Act did not extinguish the Band's inherent tribal right of self-government or its inherent right to make decisions about its own employees.* Just as important, nowhere in the Act is there any language from which to infer that Congress was limiting the Band's inherent right to self-government.

In fact, § 1725(i) of the 1980 Federal Act contains an express recognition by Congress that the Band is a federally recognized Indian tribe with all of the rights appurtenant thereto; and in § 1726(a) of the same Act, Congress expressly acknowledges that the Maliseet are entitled to organize themselves for the purposes of self-government, a key element of its retained sovereignty. Nothing in the State Implementing Act could conflict with this explicit recognition by Congress of the Maliseets' inherent sovereign rights since § 1735(a) of the 1980 Federal Act makes its language prevail over any such conflict.

This plain recognition by Congress in the 1980 Federal Act of the Maliseet's inherent tribal right of self-government is the "crucial 'backdrop'" against which any assertion of state authority over the Band must be assessed. *Mescalero*, 462 U.S. at 334. *Bracker, supra. Santa Clara Pueblo*, 436 U.S. at 60. *McClanahan, supra.* Yet the majority ignored this federal common law establishing the Maliseet's retained tribal sovereignty as well as the plain language of the 1980 Federal Act to conclude that all of the Maliseet's inherent sovereign rights were extinguished, including the Band's inherent tribal rights to self-government and to make its own employment decisions.

### *B. The Lower Court Refused To Apply the Canons of Construction In Interpreting the 1980 Federal Act.*

Normal rules of construction do not apply when statutes involving Indians are in issue. *Montana v. Blackfeet Tribe*, 471 U.S. 759, 766(1985). *Mescalero Apache Tribe v. Jones*, 411 U.S. 145, 161-162(1973). Rooted in the unique trust relationship between the Federal Government and the Indians, the canons of construction provide that statutes addressing the extent of Indian rights are to be interpreted liberally in favor of the Indians with any ambiguities construed for their benefit, *County of Yakima v. Confederated Tribes and Bands of Yakima Nation*, 502 U.S. 251, 269(1992). *McClanahan*, 411 U.S. at 174. *Choctaw Nation v. Oklahoma*, 397 U.S. 620, 631(1970). *Alaska Pacific Fisheries v. United States*, 248 U.S. 78, 89(1918).

Furthermore, Congress' intent to extinguish inherent Indian tribal rights, especially those of self-government, must be explicit, plain and unambiguous and will not be lightly implied from the statutory provisions. *United States v. Dion*, 476 U.S. 734, 738-739(1986).*County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247-248 (1985). This is because Congress has consistently encouraged Indian self-government including its "overriding goal" of encouraging tribal self-sufficiency and economic development. *Oklahoma Tax Comm'n v. Potawatomi Tribe*, 498 U.S. 505, 510-511(1991). *California v. Cabazon Band of Mission Indians*, 480 U.S. at 216-217 quoting *Mescalero*, 462 U.S. at 334-335 and citing *Bracker*, 448 U.S. at 143. "These are important federal interests," *Cabazon*, 480 U.S. at 217, which the court of appeals was bound to accommodate in its construction of

the 1980 Federal Act.

The lower court failed to do so. If it had properly applied this Court's canons of construction, it would have concluded that even if the 1980 Federal Act applies to the Band, its provisions do *not* explicitly divest the Maliseet of their inherent tribal sovereign right to govern their own internal affairs----including their own employment decisions----as required by the decisions of this Court. That the Passamaquoddy Tribe and the Penobscot Nation both bargained for and obtained from the State of Maine (and eventually from the federal authorities) express, specific legislation in both the 1980 Federal Act and the State Implementing Act giving them jurisdiction over their internal tribal affairs only restates what each of these tribes *already possessed under federal common law*. It was redundant legislation which restates the inherent tribal rights of these two tribes; it was not a stepping stone for the court below to conclude that this restatement meant that the Maliseet do *not* now retain under the federal common law their own inherent tribal rights to self government and to make their own employment decisions.

In addition, the 1980 Federal Act fails to reflect any specific intent by Congress to divest *any* Indian group, including the Maliseet, of their inherent tribal sovereign right of self government. Instead, there is only the general statement that all Indian groups will be subject to state law. However, consistent with this Court's canons, this is *not* enough to divest the Maliseet of their inherent tribal rights. As this Court has made clear, unless and until Congress explicitly carves out these inherent tribal rights in specific legislation and qualifies them----which the 1980 Federal Act clearly has

*not* done-----the Maliseet's inherent sovereign right to govern itself and to make its own employment decisions remains unhindered by the 1980 Federal Act.

In this statutory analysis, the provisions of the State Implementing Act are ultimately immaterial for purposes of determining whether the Band's decision to discharge the tribe's employees is insulated from State regulations. State law cannot limit or qualify the tribe's inherent sovereignty to any greater extent than that which Congress has already done through appropriate Federal legislation. *California v. Cabazon Band of Mission Indians*, 480 U.S. at 207. *Bracker*, 448 U.S. at 141-143. *Mescalero*, 462 U.S. at 334.*McClanahan*, 411 U.S. at 170-171. Thus State legislation could not possibly have divested the Maliseet of their inherent tribal authority to govern themselves *without Congress having already done so* by explicit legislation.

Since Congress has not done so, State law could not accomplish this result. As a matter of statutory law, employing all of the canons of construction attendant to legislation affecting Indians, the court below should have ruled that the Maliseet were not divested of their inherent tribal authority to govern their own affairs or to make their own employment decisions free of State regulation. By ruling to the contrary, by wrongly resorting to the 1980 Federal Act to justify State regulation of the tribe's internal affairs, the court of appeals has substituted its will for the will of Congress and rendered two hundred years of Federal Indian jurisprudence a nullity.

Indeed, the court below continues to undercut Congress and this Court's decisions on the issue by again

ruling that, except for the Passamaquoddy Tribe and the Penobscot Nation, the 1980 Federal Act together with the State Implementing Act has stripped *all* Maine tribes of their inherent tribal rights rendering all of their internal tribal affairs fully subject to Maine law . See *State of Maine v. Johnson, et al.*, 2007 U.S. App. LEXIS 18761(1st Cir. 8/8/07).

### *C. As A Matter of Federal Common Law, Ignored By the Court Below, The Band Has The Inherent Right To Discharge Tribal Employees Arising From Consensual Employment Entirely On Tribal Lands.*

In *Montana v. United States*, 450 U.S. 544, 564-567(1981), this Court held that Indian tribes have jurisdiction over nonmembers of the tribe for conduct on land not owned by the tribe but within its reservation boundaries when the nonmember has either entered into a consensual relationship with the tribe or when the nonmember has engaged in conduct which would harm tribal interests. *Id. Strate v. A-1 Contractors*, 520 U.S. 438, 446(1997). *A fortiori*, where as here the nonmember employee works entirely on tribal land held in trust for the tribe, working only for the tribal government itself on issues solely affecting tribe members, the tribe has the inherent authority to make employment-related decisions about this employee including discharging her for cause and determining the propriety of her workplace discrimination claims.

This inherent right has been repeatedly recognized in federal common law, is embodied in the Tribal Employment Rule and is founded on such inherent tribal

authority as is necessary to protect tribal self-government and to control its internal affairs. The "consensual relationship" includes the employment here, one founded upon a contract where the employee through acceptance of the employment manual acceded to the remedies the tribe made available in the event of discharge or other work-related problem. Moreover, the employment took place entirely on tribal lands where "the federal interest in encouraging tribal self-government is at its strongest." *Bracker*, 448 U.S. at 144. *Williams v. Lee*, 358 U.S. 217, 223(1959). As a matter of federal common law developed by this Court and the lower federal courts, the majority erred in divesting the Band of the inherent tribal authority to decide the workplace discrimination claims of the respondent Zetts.

**2. The Court of Appeals' Ruling Conflicts With The Predominant View Of Other Circuit Courts of Appeals That A Federally Recognized Indian Tribe, Unless Specifically Prohibited From Doing So By Congress, Possesses The Preeminent, Inherent Sovereign Right To Decide Workplace Discrimination Claims Brought Against It By Its Employee Arising Entirely From Her Voluntary Employment On Tribal Lands.**

As adverted to Part 1., *supra*, at least four courts of appeals have followed the Tribal Employment Rule: absent a "clear and plain" intent by Congress' otherwise, an Indian tribe's decision to discharge a tribal or reservation-based employee whose job is related to the tribe's self-governance or its administration is an "intramural" matter exempt from federal or state

regulation. *Snyder v. Navaho Nation, supra. Gallegos v. Jicarrella Apache Nation, supra. Taylor v. Alabama Intertribal Council Title IV, supra. Fond du Lac Heavy Equip. & Constr. Co., Inc., supra.*

The decision below rejects the Tribal Employment Rule, refuses to acknowledge any form of inherent tribal rights in the wake of the 1980 Federal Act and has concluded that other than the Passamaquoddy Tribe and the Penobscot Nation, no other tribe in Maine has the inherent tribal sovereignty, i.e., the right of self-government, to withstand regulation by the State of their internal tribal affairs. This is demonstrably wrong, exposes the various Maine tribes, including the Maliseet, to unjustified and meddlesome State intervention in its internal tribal matters, invoking the jurisdiction of this Court to resolve this controversy in the Band's favor.

## CONCLUSION

For all of these reasons identified herein, a writ of certiorari should issue to review the judgment of the United States Court of Appeals for the First Circuit and to vacate and reverse that judgment and remand the matter to the United States District Court for the District of Maine with instructions that the petitioner complaint for declaratory and injunctive relief be granted and that judgment enter permanently enjoining the Commission from applying MHRA or Title VII against the petitioner because under both federal common law and by federal statute, the Band enjoys a right of self-governance and the inherent tribal sovereignty which prohibits the enforcement of state employment discrimination laws against it; or provide the petitioner with such other relief as is fair and just in the

circumstances of this case.

Respectfully submitted,

Dennis P. Derrick
7 Winthrop Street
Essex, MA 01929-1203
(978) 768-6610

Douglas J. Luckerman
*Counsel of Record*
20 Outlook Drive
Lexington, MA 02421
(781)861-6535

(any footnotes trail end of each document)

No. 06-1774
UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

HOULTON BAND OF MALISEET INDIANS,
Plaintiff, Appellant,

v.

PATRICIA E. RYAN, Executive Director, Maine Human Rights Commission; MAINE HUMAN RIGHTS COMMISSION MEMBERS; G. STEVEN ROWE, Attorney General of the State of Maine; CONNIE ZETTS,
Defendants, Appellees.

April 17, 2007, Decided

COUNSEL: Douglas J. Luckerman, with whom Law Office of Douglas J. Luckerman, Michael A. Duddy, Kelly, Remmel & Zimmerman, and David Kaplan were on brief, for appellant.

Christopher C. Taub, Assistant Attorney General, with whom G. Steven Rowe, Attorney General, Paul Stern, Deputy Attorney General, and John P. Gause, Counsel to the Maine Human Rights Commission, were on brief, for appellees Ryan, Maine Human Rights Commission Members, and Rowe.

JUDGES: Before Lynch, Circuit Judge, Campbell, Senior Circuit Judge, and Lipez, Circuit Judge. LIPEZ, Circuit Judge, concurring.

OPINION BY: LYNCH

OPINION: LYNCH, Circuit Judge. The Houlton Band of Maliseet Indians ("Houlton Band") is an Indian tribe based in northern Maine and the plaintiff in this lawsuit. According to the tribe's complaint, in August 2005 the Houlton Band ended its employment relationship with Connie Zetts, an employee who had worked in the tribe's health clinic since November 2004. Zetts proceeded to file charges of employment discrimination with the Maine Human Rights Commission ("the Commission"), a state agency that investigates discrimination charges. She alleged that the Houlton Band had violated the Maine Human Rights Act, Me. Rev. Stat. Ann. tit. 5, §§ 4551-4634, a state employment discrimination statute.

In response, the Houlton Band filed the instant lawsuit in federal district court. The suit named as defendants Zetts, the Commission's members and executive director, and Maine's Attorney General. The Houlton Band's two-count claim was that either as a result of its inherent tribal sovereignty and its alleged statutory right to self-governance, or as a result of tribal sovereign immunity, Maine was precluded from enforcing its anti-discrimination laws against the Houlton Band. The Houlton Band sought both declaratory and injunctive relief to stop the Commission from proceeding with Zetts' complaint, and with any future discrimination complaints filed by employees and former employees of the Houlton Band.

The federal proceedings were originally held before a magistrate judge, and the defendants each moved to dismiss the complaint. The magistrate judge

recommended that, as to the Commission members and the state individual defendants, the court should dismiss both counts under the doctrine of claim preclusion. This ruling was based on the fact that the Houlton Band had previously litigated similar issues in a 1996 lawsuit it filed against the Commission, a case that led to a final judgment against the Houlton Band. See *Houlton Band of Maliseet Indians v. Me. Human Rights Comm'n*, 960 F. Supp. 449 (D. Me. 1997). That earlier case had never been appealed. As to defendant Zetts, who had not been a party to the earlier lawsuit, the magistrate judge recommended that the tribe's claims be dismissed on the basis of issue preclusion. The district court adopted the magistrate judge's recommendations, and it dismissed the complaint.

On appeal, we need not resolve the contested issues surrounding the preclusion doctrines. That is because even if the Houlton Band is not precluded from bringing this lawsuit, it is clear that the tribe would lose on the merits. Our decision in Aroostook Band of Micmacs v. Ryan, Nos. 06-1127 and 06-1358, issued this same day, forecloses both of the Houlton Band's claims. Aroostook holds that a federal statute, the Maine Indian Claims Settlement Act of 1980, 25 U.S.C. §§ 1721 -1735, allows Maine to enforce its employment discrimination laws against Maine tribes, including the Houlton Band (and other than the Passamaquoddy Tribe and the Penobscot Nation). See *Aroostook*, 2007 U.S. App. LEXIS 8710, at *18-33, *35-42, *49-51; see also 25 U.S.C. § 1725(a).

The judgment of the district court dismissing the action is affirmed. Costs are awarded to the defendants-appellees.

-Concurring opinion follows-

CONCUR BY: LIPEZ

CONCUR: LIPEZ, Circuit Judge, concurring. I concur with the judgment of the majority affirming the judgment of the district court dismissing the action against all defendants, but reach that outcome on the basis of preclusion principles.

CV-05-180-B-W

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MAINE

HOULTON BAND OF MALISEET INDIANS,
Plaintiff

v.

PATRICIA E. RYAN, EXECUTIVE DIRECTOR MAINE HUMAN RIGHTS COMMISSION, et al.,
Defendants.

April 6, 2006, Decided

COUNSEL: [*1] For HOULTON BAND OF MALISEET INDIANS, Plaintiff: DOUGLAS J. LUCKERMAN, LUCKERMAN ESQ, LEXINGTON, MA; MICHAEL A. DUDDY, KELLY, REMMEL & ZIMMERMAN, PORTLAND, ME.

For MAINE HUMAN RIGHTS COMMISSION EXECUTIVE DIRECTOR, MAINE HUMAN RIGHTS COMMISSION MEMBERS, Defendants: CHRISTOPHER C. TAUB, MAINE ATTORNEY GENERAL'S OFFICE, AUGUSTA, ME; JOHN P. GAUSE, MAINE HUMAN RIGHTS COMMISSION, AUGUSTA, ME.

For ATTORNEY GENERAL, ME, Defendant,: CHRISTOPHER C. TAUB, MAINE ATTORNEY GENERAL'S OFFICE, AUGUSTA, ME.
For CONNIE ZETTS, Defendant: CONNIE ZETTS, LITTLETON, ME.

JUDGES: John A. Woodcock, Jr., UNITED STATES DISTRICT JUDGE.

**OPINION BY:** John A. Woodcock, Jr

**OPINION: ORDER AFFIRMING THE RECOMMENDED DECISIONS OF THE MAGISTRATE JUDGE**

The United States Magistrate Judge filed with the Court on February 3, 2006 her Recommended Decision on the Motion to Dismiss filed by the Commission defendants (Docket # 21). On February 14, 2006, the United States Magistrate Judge filed with the Court her Recommended Decision on the Motion to Dismiss filed by Connie Zetts (Docket # 24). The Plaintiff filed its objections to the Recommended Decision on the Commission's Motion to Dismiss on February 17, 2006 (Docket # 26) and the Commission defendants filed their response to those objections on March 3, 2006 (Docket # 27). The Plaintiff also filed an objection to the Recommended Decision on Ms. Zetts' Motion to Dismiss, which was not responded to by Defendants (Docket # 28).

I have reviewed and considered the Magistrate Judge's Recommended Decisions, together with the entire record; I have made a de novo determination of all matters adjudicated by the Magistrate Judge's Recommended Decision; and I concur with the recommendations of the United States Magistrate Judge for the reasons set forth in her Recommended Decisions, and determine that no further proceeding is necessary.[1]

1. It is therefore ORDERED that the Recommended Decisions of the Magistrate Judge (Docket # s 21, 24) are hereby AFFIRMED.

2. It is further ORDERED that Defendant Commission's Motion to Dismiss (Docket # 9) and Defendant Zetts' Motion to Dismiss (Docket # 15) are hereby GRANTED.

3. Plaintiff's request for oral argument is DENIED.

SO ORDERED.

/s/ John A. Woodcock, Jr.

UNITED STATES DISTRICT JUDGE

Dated this 6th day of April, 2006

- - - - - - - - - - - - - - - Footnotes - - - - - - - - - - - - - - -

n1 In its Objections to the Recommended Decisions, Plaintiff requests oral argument (Docket # s 26, 28). Local Rule 7(f) of the Local Rules for the United States District Court of the District of Maine grants this Court discretion as to whether to allow oral argument. Here, this Court concludes the issues presented by the written submissions are sufficiently clear without oral argument.

Civil No. 05-180-B-W

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE
HOULTON BAND OF MALISEET INDIANS,
Plaintiff

v.

PATRICIA E. RYAN, EXECUTIVE DIRECTOR
MAINE HUMAN RIGHTS COMMISSION, et al.,
Defendants

February 3, 2006, Decided

COUNSEL: For HOULTON BAND OF MALISEET INDIANS, Plaintiff: DOUGLAS J. LUCKERMAN, LAW OFFICE OF DOUGLAS J. LUCKERMAN ESQ, LEXINGTON, MA; MICHAEL A. DUDDY, KELLY, REMMEL & ZIMMERMAN, PORTLAND, ME.

For MAINE HUMAN RIGHTS COMMISSION EXECUTIVE DIRECTOR, MAINE HUMAN RIGHTS COMMISSION MEMBERS, Defendants: CHRISTOPHER C. TAUB, MAINE ATTORNEY GENERAL'S OFFICE, AUGUSTA, ME; JOHN P. GAUSE, MAINE HUMAN RIGHTS COMMISSION, AUGUSTA, ME.

For ATTORNEY GENERAL, ME, Defendant: CHRISTOPHER C. TAUB, MAINE ATTORNEY GENERAL'S OFFICE, AUGUSTA, ME.

For CONNIE ZETTS, Defendant: Pro se, LITTLETON, ME.

**JUDGES:** Margaret J. Kravchuk, U.S. Magistrate Judge.

**OPINION BY:** Margaret J. Kravchuk

**OPINION**

***RECOMMENDED DECISION ON MOTION TO DISMISS***

The Houlton Band of Maliseet Indians is pressing a two-count complaint against Executive Director of the Maine Human Rights Commission Patricia Ryan, members of the Maine Human Rights Commission, Attorney General Steven Rowe, and Connie Zetts, a former Houlton Band employee. Count One contends that the Maine Human Rights Commission's actions with respect to employee charges of discrimination against Houlton Band interfere with Houlton Band's inherent sovereignty and its federal statutory right of self governance. Count Two asserts that, although the Maine Indian Claims Settlement Act (MICSA) abrogated Houlton Band's sovereign immunity from law suits heard in courts, it did not abrogate its sovereign immunity with respect to the Maine Human Rights Commission's out-of-court administrative proceedings.

The Commission defendants have filed a motion to dismiss the complaint (Docket No. 9) which has been referred to me for a recommended disposition. [1] In this motion the defendants argue that principles of claim and issue preclusion foreclose Count One of the Houlton

Band's complaint in light of Judge Brody's decision in *Houlton Band of Maliseet Indians v. Maine Human Rights Commission, 960 F. Supp. 449 (1997).* As to Count Two, the defendants believe that a claim of sovereign immunity as a defense to an employment discrimination claim is defeated by *25 U.S.C. § 1725(a)* as it subjects the Houlton Band to the "civil and criminal jurisdiction" of Maine to the same extent as any other person.

For the reasons set forth below, I recommend that the Court grant this motion to dismiss on the grounds that both counts of Houlton Band's current complaint are barred by the doctrine of claim preclusion.

***Discussion***

***The Prior Litigation***

***The 1996 Complaint***

Count One of Houlton Band's 1996 complaint sought declaratory judgment against the Maine Human Rights Commission (MHRC) and the State of Maine (as well as the Department of the Interior and the Bureau of Indian Affairs) apropos complaints of unlawful employment discrimination against the Houlton Band because the complaints involved the internal tribal matters of the Houlton Band. (1996 Compl. ¶¶ 26, 27, 28.) It alleged that between November 1, 1995, and January 17, 1996, four of Houlton Band's former employees had filed complaints with the MHRC. (Id. ¶ 14.) It alleged that on December 20, 1995, Houlton Band asked, in a "Request for Administrative Dismissal," that the MHRC dismiss two of the complaints for lack of jurisdiction. (Id. ¶ 15) (emphasis added). The request was rebuffed, based, at least in part, on the advice of

the Attorney General. (Id. ¶¶ 16-17.) Houlton Band contended that it had inherent sovereign rights to control its internal tribal matters (id. P 19) and that its employment decisions when acting as a tribal governmental employer are internal tribal matters and are not subject to state regulation (id. ¶ 20). The complaint relied on *25 U.S.C. § 1726(a)* and its provision that the Houlton Band could organize for its common welfare and adopt an appropriate instrument in writing to govern its affairs when acting in its governmental capacity. (Id. ¶ 21.)

Count Two of the 1996 complaint charged the MHRC and the Attorney General with violating Houlton Band's right to Equal Protection. (Id. ¶¶ 29-30.) And Count Three was asserted as a *42 U.S.C. § 1983* count alleging, in a rather catch-all fashion, deprivations of Houlton Band's rights, privileges, and immunities guaranteed by the United States Constitution. (Id. ¶¶ 31-33.)

***The 1997 Decision***

In *Houlton Band of Maliseet Indians v. Maine Human Rights Commission, 960 F. Supp. 449 (D. Me. 1997)* the Court analyzed the parameters of Houlton Band's sovereign immunity within the context of the MICSA and the Maine Implementing Act (MIA). The decision stated:

> The Supreme Court has recognized that although the sovereign powers of Indian tribes are broad, "the sovereignty that the Indian tribes retain is of a unique and limited character." *United States v. Wheeler, 435 U.S. 313, 323, 98 S.*

*Ct. 1079, 55 L. Ed. 2d 303 (1978).* The Court explained:

> [Indian tribes' sovereignty] exists only at the sufferance of Congress and is subject to complete defeasance. But until Congress acts, the tribes retain their existing sovereign powers. In sum, Indian tribes still possess those aspects of sovereignty not withdrawn by treaty or statute, or by implication as a necessary result of their dependent status.

Id. In other words, Indian tribes retain their sovereignty solely at the will of Congress. "Congress has plenary authority to limit, modify or eliminate the powers of local self-government which the tribes otherwise possess." *Santa Clara Pueblo v. Martinez, 436 U.S. 49, 56, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978).* It is upon this backdrop that the Court examines the extent to which Congress has limited the Band's otherwise sovereign rights, and, ultimately, if the Band retains the right to be free from state interference with claims of unlawful employment discrimination.

In 1979, the Passamaquoddy Tribe and the Penobscot Nation entered into a settlement agreement with the State of Maine regarding land claims disputes ("the Maine Implementing Act" or "the Agreement"). See *30 M.R.S.A. §§ 6201-6214.* In addition to settling the land claims disputes, the Agreement also sets forth the legal status of the Passamaquoddy Tribe, the Penobscot Nation, and the Band with regard to the State. For

instance, the Agreement provides that "the Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State." Id. *§ 6202*. The Agreement also states:

> Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person or lands or other natural resources therein.

Id. *§ 6204*. As this section makes explicit, the Band is subject to the laws of the State of Maine unless there is an exemption elsewhere in the Agreement. There is no exemption for the Band from coverage under the Maine Human Rights Act.

The Agreement, moreover, specifically provides that the internal tribal matters of the Passamaquoddy Tribe and the Penobscot Nation "shall not be subject to regulation by the State." Id. *§ 6206(1)*. The Band, however, is glaringly absent from this exemption. Moreover, the Agreement declares:

> The Houlton Band of Maliseet Indians shall not exercise nor enjoy the powers, privileges and immunities of a municipality nor exercise civil or criminal jurisdiction within their lands, prior to the enactment of additional legislation specifically authorizing the exercise of those governmental powers.

Id. *§ 6206-A* (emphasis added). There has not been additional legislation that permits the Band to exercise civil or criminal jurisdiction within its lands.

Only Congress has the plenary authority to limit the sovereign rights of Indian groups. Accordingly, in 1980, Congress passed the Maine Indian Claims Settlement Act (also referred to as "the Act"). See *25 U.S.C. §§ 1721-1735*. The Act ratified the Agreement between the Penobscot Nation, the Passamaquoddy Tribe and the State of Maine, and confirmed "that all other Indians, Indian nations and tribes and bands of Indians now or hereafter existing or recognized in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein." Id. *§ 1721(b)(3), (4)*. Most significantly, the Act states:

> Except as provided in *section 1727(e)* and *section 1724(d)(4)* of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members . . . . shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.

Id. *§ 1725(a)* (emphasis added). *Section 1727(e)* concerns the applicability of the Indian Child Welfare Act, and *§ 1724(d)(4)* pertains to the possibility of future agreements between the

Band and the State of Maine permitting the acquisition of land by the United States in trust for the Band. Id. *§§ 1727(e), 1724(d)(4). Section 1724(d)(4)* provides, however, that "such agreement shall not include any other provisions regarding the enforcement or application of the laws of the State of Maine." Id. *§ 1724(d)(4).* Neither *§ 1727(e)* nor *§ 1724(d)(4),* therefore, exempts the Band from "internal tribal matters" or from the civil law of the State that is within the jurisdiction of the MHRC.

The Act further states that the Passamaquoddy Tribe, the Penobscot Nation, and the Band may sue and be sued in the courts of the State of Maine to the same extent as any other person in the State; however, "the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act." Id. *§ 1725(d)(1).* It is noteworthy that *§ 1725* does not create a similar exemption for the Band. The First Circuit has held: "When, as now, Congress has unambiguously expressed its intent through its choice of statutory language, courts must read the relevant laws according to their unvarnished meaning, without any judicial embroidery." *Passamaquoddy Tribe v. State of Maine, 75 F.3d 784, 793 (1st Cir.1996).* It is indeed clear from the statutory language of the Maine Implementing Act and the Maine Indian Claims Settlement Act that the Band is subject to the civil laws of the State and, therefore, to the jurisdiction of the

> MHRC for claims of unlawful employment discrimination.

*Id. at 451-53.*

In this prior litigation, the Court explained, Houlton Band was not "claiming that it is exempt from all state laws": It argued that it was "exempt from those state laws that interfere with its right to self-government and self-determination and that the claims of unlawful employment discrimination against the Band that [were] presently before the MHRC [were] matters that related to the Band's self-government and self-determination." *Id. at 453.* The Court rejected this argument as "seriously flawed." Id. It reasoned:

> The complainants contend that they were fired because of their race and because they reported illegal activity. Such employment action is prohibited by Maine law. Since the Band is subject to the civil laws of the state, it may not engage in unlawful employment discrimination. Accordingly, the MHRC has jurisdiction to review the claims of unlawful employment discrimination against the Band that are before it. Further, even if the MHRC's ultimate decision has an incidental effect on the Band's government, the Band is nonetheless subject to its jurisdiction.

*Id. at 454* (citing *Houlton Band of Maliseet Indians v. Boyce, 1997 ME 4, 688 A.2d 908, 911 (Me. 1997)).*

And then the Court explained:

The Band also relies on Mitchell v. Passamaquoddy Tribe No. 84-0073 (D. Me. Jan. 9, 1990 (Recommended Disposition of the Magistrate), aff'd. (D.Me. Feb. 1, 1990) (Carter, C.J.), for support of its position that the MHRC does not have jurisdiction over the claims against the Band. The Band contends that Mitchell holds that the hiring and firing of its employees is an integral part of tribal government and, as such, is an "internal tribal matter" that is free from state interference. The Band's reliance on Mitchell is misplaced. The Court notes that Mitchell involved a claim of a former employee of the Passamaquoddy Tribe under *42 U.S.C, § 1983.* The "internal tribal matters" of the Passamaquoddy Tribe, however, are not subject to state regulation. See *30 M.R.S.A. § 6206(1).* There is no such exemption for the Band. As stated by the Maine Implementing Act and ratified by the Maine Indian Claims Settlement Act, all Indian groups within the State of Maine shall be subject to the civil and criminal jurisdiction of the State except as otherwise indicated. See *30 M.R.S.A. § 6204*; *25 U.S.C. §§ 1721(b)(3)-(4), 1725(a).* Therefore, even if the hiring and firing of employees is an "internal tribal matter," a matter that the Court does not address here, the Band is still subject to the civil and criminal jurisdiction of the State if such hiring and firing implicates state law. Since the complainants before the MHRC allege they were fired in violation of state law, the Band is subject to the jurisdiction of the MHRC.

The Band also contends that *25 U.S.C. § 1726* supports the Band's sovereign right to control its "internal tribal matters." *Section 1726(a)* states:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation or band when each is acting in its governmental capacity.

Id. It is noteworthy, however, that *§ 1726* also provides the following caveat: "Such instrument and any amendments thereto must be consistent with the terms of this subchapter and the Maine Implementing Act." Id. Therefore, although the Band may organize for its common welfare and adopt a governing instrument for its members, it must do so in accordance with the terms of the Maine Implementing Act and the Maine Indian Claims Settlement Act. As explained above, the terms of the Maine Indian Claims Settlement Act and the Maine Implementing Act provide that the Band is subject to the laws of the State of Maine. There is nothing in *§ 1726* that holds to the contrary. Additionally, *§ 6206(1)* of the Maine Implementing Act exempts only the Passamaquoddy Tribe and the Penobscot Nation from the laws of the State regarding "internal tribal matters." The Band is afforded no such exemption. *Section 6206(1)* was ratified by Congress in *25 U.S.C. § 1721*. Thus Congress's intent is clear. The Band is not exempt from State law affecting "internal tribal matters." The Court

> does not address the issue of whether the State may exercise jurisdiction over the Band's "political" decisions, such as what form of government it chooses or how it conducts its elections of tribal council members. Yet to the extent that the Band's actions affect and implicate state law, the Band is subject to the civil and criminal jurisdiction of the State.

*Id. at 454-55* (emphasis added).

After analyzing and rejecting Houlton Band's Title VII related challenge to the MHRC's jurisdiction over MHRA claims, the Court concluded:

> The express will of Congress, as codified in the Maine Indian Claims Settlement Act, controls the present issue. As explained above, "When . . . Congress has unambiguously expressed its intent through its choice of statutory language, courts must read the relevant laws according to their unvarnished meaning. . . ." *Passamaquoddy Tribe v. State of Maine, 75 F.3d 784, 793 (1st Cir.1996).* While it is true that "ambiguities in legislation affecting retained tribal sovereignty are to be construed in favor of the Indians," *Washington v. Yakima Indian Nation, 439 U.S. 463, 484, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979),* Congress has been absolutely clear regarding the legal status of the Band. It is unequivocally subject to the civil and criminal laws of the State of Maine, including the Maine Human Rights Act and the Whistleblowers' Protection Act.

*Id. at 455-56.*

*The Present Litigation*

*The 2005 Complaint*

The allegations of Houlton Band's current complaint as relevant to the resolution of the current motion are as follows. [2] Connie Zetts was employed by the Houlton Band at its health clinic as an LPN and phlebotomist. (Am. Compl. ¶ 10.) On October 4, 2005, Zetts filed a charge of discrimination with the MHRC alleging discrimination under both the Maine Human Rights Act (MHRA) and Title VII and she requested that charges be filed with the Equal Employment Opportunity Commission and the MHRC. (Id. ¶ 21.) In an October 28, 2005, letter Patricia Ryan notified Houlton Band that the MHRC had opened a preliminary investigation and demanded that the Houlton Band submit "an extensive reply including documents production." (Id. ¶ 22.)

*Count One*

In Count One the Houlton Band argues that MHRC actions with respect to employee charges of discrimination against it interferes with Houlton Band's inherent sovereignty and its federal statutory right of self governance. It opines that Indian tribes may exercise various rights of inherent sovereignty protected by federal common law (id. ¶ 24) and a tribe's inherent sovereignty includes the right of Indians to make their own laws and to live by them, absent abrogation by the Congress or the consent of the tribe (id. ¶ 25). The Maliseets received federal recognition under *25 U.S.C. § 1725(i)*, [3] (id. ¶ 26), a subsection of MICSA. Subsection 1726(a) of MICSA provides that Houlton Band may organize a government and govern

itself. (Id. ¶ 27.) [4] The Band's tribal government has established a process to address employment matters, including grievances and the hiring and firing of employees; the tribal government is the final decision maker on these matters. (Id. ¶ 33.) [5]

Houlton Band seeks an injunction to halt the enforcement of the State employment laws against it -- including an injunction on the attendant investigations and discovery demands. (Id. ¶ 37.) It wants a declaration that Houlton Band possesses all the inherent sovereign rights of Indian tribes, including self-governance, unless and until Congress expressly abrogates those rights. (Id. ¶ 38.) And, finally as to Count One, Houlton Band wants a declaration that it possess all of its statutory rights including but not limited to rights of self-governance available to other federally recognized tribes unless and until Congress expressly abrogates those rights. (Id. ¶ 39.)

*Count Two*

Count Two of Houlton Band's current complaint asserts the MHRC's administrative proceedings interfere with Houlton Band's retained rights of sovereign immunity. Specifically, it contends that as a matter of federal law Houlton Band's sovereign immunity bars the enforcement of State anti-discrimination laws against the tribal government by the MHRC. (Am. Compl. ¶ 41.) Each attribute of sovereign immunity is separate, and the waiver of one does not imply the waiver of another. (Id. ¶ 44.) Congress, by enacting *25 U.S.C. § 1725(d)(1)*, only abrogated Houlton Band's sovereign immunity from lawsuits heard "in the courts of the State of Maine and the United States." (Id. ¶ 45.) Congress never

abrogated its sovereign immunity for non-judicial proceedings such as administrative proceedings and hearings conducted by the MHRC. (Id. ¶ 46.) [6]

Apropos Count Two Houlton Band requests a declaration that its sovereign immunity bars the administrative enforcement of State anti-discrimination laws against Houlton Band by the MHRC in any forum other than "in the courts of the State of Maine and the United States." (Id. ¶ 48.) It also wants the Court to enjoin the MHRC from administrative enforcement activity against the tribal government of Houlton Band. (Id. ¶ 49.)

***Claim Preclusion and Houlton Band's Argument Against It***

Under the doctrine of res judicata/claim preclusion,

> "a final judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action." *Breneman v. United States ex rel. F.A.A., 381 F.3d 33, 38 (1st Cir.2004)* (citation omitted). Specifically, res judicata applies when the following exist: "(1) a final judgment on the merits in an earlier proceeding, (2) sufficient identicality between the causes of action asserted in the earlier and later suits, and (3) sufficient identicality between the parties in the two actions." Id. This doctrine, also known as claim preclusion, serves the purpose of "relieving parties of the cost and vexation of multiple lawsuits, conserving judicial resources, and . . . encouraging reliance on adjudication." Id.

(quoting *Allen v. McCurry, 449 U.S. 90, 94, 101 S. Ct. 411, 66 L. Ed. 2d 308 (1980)).*

*Gonzalez-Pina v. Rodriguez, 407 F.3d 425, 429-30 (1st Cir. 2005)* (emphasis added). [7]

With respect to the defendants' claim preclusion defense, Houlton Band contends that the defendants' argument fails under the "sufficient identicality between the causes of action asserted in the earlier and later suits" prong of the inquiry. (Opp'n Mot. Dismiss at 4.) It states: "The claim presented here may be summarized quite simply: *the Band's federally protected rights to self-governance (inherent sovereignty) and its sovereign immunity prohibit the MHRC from investigating Maine Human Rights Act charges brought by Defendant Zetts in 2005.*" (Id.) Houlton Band maintains that the factual underpinnings of the current complaint are not related in time, space, or origin to the facts of the 1997 suit. (Id. at 5.) The facts are different, it asserts, as the two cases involve "employees bringing claims a decade apart and instigating separate and different investigations by the MHRC." (Id.) "Litigation of the Zetts investigation," Houlton Band contends, "could not possibly form a convenient trial unit with *Houlton Band [v. of Maliseet Indians v. Maine Human Rights Commission, 960 F.Supp. 449 (D. Me. 1997)]*, and it is absurd to suggest that the parties [in the 1996 action] expected to adjudicate any of the instant claims." [8]

What astounds me about this position is that if the Court were to embrace this argument then the relief that Houlton Band now seeks (and sought in the 1996 litigation), declaratory and injunctive relief that would apply to all future employee/Houlton Band MHRA

disputes, would be binding upon the MHRC but not the Band. As to those future disputes such employees/prospective MHRA litigants would have no expectation that this litigation is adjudicating any of their potential claims. Under Houlton Band's theory, if the nature of each employee's employment-related claim gives rise to a separate cause of action apropos the Houlton Band's amenability to investigation and suit under the MHRA then the injunctive and declaratory relief it would be entitled to would necessarily be limited to the claims of the employees named in the suit. There is no question that the prayer for relief in the amended complaint seeks (and sought in 1996) relief that Houlton Band could use to ward off future MHRA investigations [9] and employee suits. (Am. Compl. at 9-10.)

In a similar vein, Houlton Band complains that barring all claims against the MHRC based on a claim preclusion theory "threatens to cloak' the MHRC in perpetual immunity and thus possibly protect conduct lasting long past the prior judgment-conduct that the law may grow to abhor." (Opp'n Mot. Dismiss at 4 n.2)(quoting *Exhibitors Poster Exch., Inc. v. Nat'l Screen Serv. Corp., 421 F.2d 1313, 1316 (5th Cir. 1970)).* [10] The Band contends that the defendants would have the 1997 decision "preclude every future claim arising from the 1980 Settlement Acts or even prohibit by them [sic]." (Opp'n Mot. Dismiss at 4 n.2.) First, these defendants are not (and could not) ask this Court to read the 1997 decision, apropos the two counts of the current complaint, as extending to non-MHRA investigation and suits. And as to MHRA investigations and suits, given the relief that Houlton Band sought in its 1996 suit and seeks again here, Houlton Band needs

to swallow the proposition that what is sauce for the goose is sauce for the gander.

I recognize that Houlton Band relies on *Lawlor v. National Screen Service Corporation, 349 U.S. 322, 75 S. Ct. 865, 99 L. Ed. 1122 (1955)*, a case which involved two anti-trust actions -- one in 1942 (which settled) and the second in 1949 -- against an "accessory distributor" and motion picture producers. The Supreme Court concluded that the two suits were not based on the same cause of action, pointing to the fact that the later-in-time action complained of conduct that occurred after the judgment in the earlier case and noting that there were new anti-trust violations alleged. *Id. at 326-28.* "While the 1943 judgment precludes recovery on claims arising prior to its entry," the Court opined, "it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case." *Id. at 328.* Houlton Band contends that Zetts' claim (and those of other employees') did not exist at the time of the 1996 complaint/ 1997 judgment and that, therefore, *Lawlor* controls. However, Houlton Band does not articulate how the nature of each employee's claim would make any difference in the court's determination apropos the declaratory and injunctive relief against the MHRC that is the core relief that it sought in 1996 and which is what the Houlton Band seeks again here. And Houlton Band has not convinced me that *Lawlor* offers any real guidance in the context of Houlton Band's two declaratory actions. [11]

In discussing the defendants' assertion of claim preclusion, Houlton Band does not argue that it could not have raised all the issues it raises here in the 1996 action. See *Breneman, 381 F.3d at 38* ("[A] final

judgment on the merits of an action precludes the parties or their privies from relitigating claims that were raised or could have been raised in that action."). Apropos the defendants' issue preclusion arguments Houlton Band does state that its complaint "raises new issues not the same as those involved in the prior action, including (a) whether tribal sovereign immunity bars MHRC administrative actions and (b) whether federal law preempts the State anti-discrimination statutes in play here under the interest balancing test of *White Mountain Apache v. Bracker, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980).*" (Opp'n Mot. Dismiss at 6-7) (emphasis added). [12]

The problem that I see with Houlton Band's notion that somehow its sovereign immunity bars MHRC's administrative actions (as opposed to in-court-efforts) is that the 1996 lawsuit was filed by Houlton Band when the complaints were in the administrative stage and the Houlton Band had filed a "Request for Administrative Dismissal" with the MHRC. (1996 Compl. ¶¶ 15-16.) This is the relief that Judge Brody denied based on his conclusion that "the MHRC has jurisdiction to review the claims of unlawful employment discrimination against the Band that are before it." *Houlton Band of Maliseet Indians, 960 F. Supp. at 454.* The Court held: "It is indeed clear from the statutory language of the Maine Implementing Act and the Maine Indian Claims Settlement Act that the Band is subject to the civil laws of the State and, therefore, to the jurisdiction of the MHRC for claims of unlawful employment discrimination." *Id. at 453* (emphasis added). The Court concluded that *25 U.S.C. § 1725(a)* subjected Houlton Band, not only to the jurisdiction of the courts of the State of Maine (a proposition that it does not dispute

here), but also abrogated its sovereign immunity apropos the MHRC's administrative jurisdiction. [13] See *Aroostook Band of Micmacs v. Ryan, 404 F.3d 48, 69 (1st Cir. 2005)* ("Again, a key flaw in Maine's analysis is its assumption that tribal sovereign immunity is only a defense to a lawsuit, and since the Commission has not filed (or threatened to file) suit against the Band, considerations of tribal sovereign immunity are premature. But tribal sovereign immunity might apply to the Commission's investigations themselves.").

With respect to Houlton Band's argument that the Court should apply the balancing test of White Mountain Apache Tribe v. Braker, that decision was issued in 1980 and was clearly at Houlton Band's disposal when it brought its 1996 action against the Commission and the State. See *Breneman 381 F.3d at 38.*

Finally, Houlton Band argues that intervening decisions have altered the legal atmosphere since the 1997 decision. (Opp'n Mot. Dismiss at 9-12.) As Houlton Band states: "The appropriate test is that changed circumstances will preclude the application of collateral estoppel only if they might have altered the decision the court made in the first proceeding.'" (Id. at 10) (quoting *Monarch Life Ins. Co. v. Ropes & Gray, 65 F.3d 973, 981 (1st Cir. 1995)).* [14] It is Houlton Band's contention that: "Courts now hold consistently that the right of Indian tribes to discharge their tribal governmental employees is specifically an *internal* matter and that federal law preempts interference with it." (Opp'n Mot. Dismiss at 10.) I have reviewed the post-1997 precedents cited by Houlton Band, see *Snyder v. Navajo Nation, 382 F.3d 892 (9th Cir. 2004); Taylor v. Ala. Intertribal Council Title IV J.T.P.A.,*

*261 F.3d 1032 (11th Cir. 2001)*; *EEOC v. Karuk Tribe Hous. Auth., 260 F.3d 1071 (9th Cir. 2001)*; *NLRB v. Pueblo of San Juan, 280 F.3d 1278 (10th Cir. 2000)*; *Penobscot Nation v. Fellencer, 164 F.3d 706 (1st Cir. 1999)*, and strongly disagree with Houlton Band that these decisions would support a reconsideration of the court's 1997 decision given the unique statutory framework of the Maine Settlement Acts. See, e.g., *Aroostook Band of Micmacs, 404 F.3d at 53* ("The tribal-state relationship between Maine and the Indian tribes located within its borders is complex."); *Akins v. Penobscot Nation, 130 F.3d 482, 489 (1st Cir. 1997)* ("We stress that we do not read the reference by Congress to *Santa Clara Pueblo [v. Martinez, 436 U.S. 49, 98 S. Ct. 1670, 56 L. Ed. 2d 106 (1978)]* in the legislative history of the Settlement Act as invoking all of prior Indian law. That would be inconsistent with the unique nature of the Maine settlement and the specific provisions of the Act limiting the application of federal Indian law."). [15] With this argument -- and with its complaint's request that the Court declare that it possesses all the inherent and statutory rights of self-governance (Am. Compl. PP 38,39) -- Houlton Band is in one sense asking the Court rewrite the Maine Indian Lands Claim Settlement Act and the Maine Settlement Act. If the United States Congress wishes to revisit the terms of its settlement with Houlton Band and rework its legislation it is within its exclusive purview to do so.

***Conclusion***

For the reasons set forth above, I recommend that the Court **GRANT** this motion to dismiss (Docket No. 9) on the grounds that both counts of Houlton Band's current complaint as against Patricia Ryan, members of

the Maine Human Rights Commission, and Steven Rowe [16] are barred by the doctrine of claim preclusion.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to *28 U.S.C. § 636(b)(1)(B)* for which *de novo* review by the district court is sought, together with a supporting memorandum, and request for oral argument before the district judge, if any is sought, within ten (10) days of being served with a copy thereof. A responsive memorandum and any request for oral argument before the district judge shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to *de novo* review by the district court and to appeal the district court's order.

February 3, 2006.

Margaret J. Kravchuk

U.S. Magistrate Judge

Footnotes

[1] Proceeding pro se, Connie Zetts has filed her own pleading seeking dismissal of the complaint as against her should the Commission defendants obtain dismissal. (Docket No. 15.) Houlton Band has filed an objection to that motion arguing: "Liberally construed, the Motion can only be read to argue that if the other defendants

are dismissed, Zetts should be dismissed. Zetts fails to offer any reason, even one liberally stated, for why she as a private, non-governmental litigant should be treated in the same fashion as the official state Defendants." (Opp'n Zetts' Mot. Dismiss at 2) (footnote omitted). Zetts' time to reply to that objection has not yet elapsed.

[2] Houlton Band filed its complaint on November 28, 2005. On December 4, 2005, it filed a motion to amend the complaint with an attachment of the proposed amended complaint. (Docket No. 4.) On December 16, 2005, I entered an order granting that motion because no responsive pleading had been filed. (Docket No. 8.) Houlton Band did not actually file the amended complaint (Docket No. 17) until after these defendants filed their motion to dismiss but it is clear that the defendants' motion is addressed to the counts framed in the amended complaint attached to the motion to amend.

[3] This subsection provides:

> As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be treated in the same

> manner as other federally recognized tribes for the purposes of Federal taxation and any lands which are held by the respective tribe, nation, or band subject to a restriction against alienation or which are held in trust for the benefit of the respective tribe, nation, or band shall be considered Federal Indian reservations for purposes of Federal taxation. Notwithstanding any other provision of law authorizing the provision of special programs and services by the United States to Indians because of their status as Indians, any member of the Houlton Band of Maliseet Indians in or near the town of Houlton, Maine, shall be eligible for such programs and services without regard to the existence of a reservation or of the residence of such member on or near a reservation.

*25 U.S.C. § 1725(i)*. The Houlton Band also cites to *25 CFR § 83.12(a)*:

> Upon final determination that the petitioner exists as an Indian tribe, it shall be considered eligible for the services and benefits from the Federal government that are available to other federally recognized tribes. The newly acknowledged tribe shall be considered a historic tribe and shall be entitled to the privileges and immunities available to other federally recognized historic tribes by virtue of their government-to-government relationship with the United States. It shall also have the responsibilities and obligations of such tribes. Newly acknowledged Indian tribes shall likewise be subject to the same authority of Congress and

the United States as are other federally acknowledged tribes.

*25 CFR § 83.12(a).* In Paragraph 26 of its amended complaint Houlton Band also cites to *Carcieri v. Norton, 423 F.3d 45, 62 (1st Cir. 2005)* for the proposition that once the Band received federal recognition it gained the same benefits as other tribes.

[4] This subsection of MICSA provides:

> The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this subchapter and the Maine Implementing Act. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall each file with the Secretary a copy of its organic governing document and any amendments thereto.

*25 U.S.C.A. § 1726(a).* The Band argues that because Congress never abrogated the Houlton Band's common law right to self-government, this provision is an affirmation of that right rather than a grant. (Am. Compl. ¶ 27.)

[5] The Houlton Band offers further legal argumentation in the remainder of its Count One allegations.' It

contends that the language of *25 U.S.C. § 1726(a)* closely tracks the language of *Section 16* of the Indian Reorganization Act of 1934 and cites to the *Morton v. Mancari, 417 U.S. 535, 542, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)* construction of *Section 16*. (Id. ¶ 28.) It argues that Houlton Band retains all attributes of its inherent sovereignty unless Congress specifically abrogates those attributes and a grant of jurisdiction to the State of Maine does not, by itself, abrogate Houlton Band's right to self-government. (Id. ¶ 29.) It asserts that any conflict between the provisions of MICSA and the MIA is controlled by MICSA. (Id.) In addition, Houlton Band urges, per the Indian canons of statutory construction, that any abrogation of tribal sovereignty must be clear and unequivocal, with all doubts resolved in Houlton Band's favor; sovereign rights cannot be extinguished by silence or by implication. (Id. ¶ 30.) The Houlton Band describes as "well settled" the federal law that state employment discrimination laws do not apply to persons employed by Indian tribal governments because such application interferes with the inherent sovereign rights of Indian tribes to self-governance and self-determination. (Id. ¶ 31; see also id. ¶ 32.) It contends that the State of Maine and the MHRC cannot meet their burden of proving that Congress has expressly abrogated the right of the Band to deal with tribal government employee matters without State interference. (Id. ¶ 34.) The continued enforcement of the State anti-discrimination laws by the MHRC, the Houlton Band argues, interferes with its rights, privileges, and immunities conferred upon Houlton Band by federal law, including MICSA and the *supremacy clause of the United States Constitution* (id. ¶ 25) and violates the equal protection rights of Houlton Band (id. ¶ 36).

[6] In support of Paragraph 46 Houlton Band cites to *United States v. Puerto Rico, 287 F.3d 212, 218 (1st Cir. 2002)* for the proposition that the word "suit" had a particular meaning in a legal context and refers specifically to an action in a judicial forum.

The remaining allegations of Count Two are, like the above citation to United States v. Puerto Rico, purely legal argumentation. Houlton Band asserts that: tribal sovereign immunity remains intact unless Congress has "unequivocally" expressed its purpose to abrogate it (id. ¶ 42); Indian tribes retain those aspects of sovereignty not withdrawn by treaty or statute; (id. P 43); and the continued enforcement of State anti-discrimination laws by the MHRC against the Houlton Band deprives Houlton Band of its rights, privileges, and immunities secured by federal law, including MICSA and the *supremacy clause of the United States Constitution.*

[7] "Res judicata" the Court explained "is an issue of law over which this court exercises plenary review." *Id. at 429* (citing *Perez-Guzman v. Gracia, 346 F.3d 229, 233 (1st Cir.2003)).* Given that this is a purely legal, as opposed to factual, inquiry there is no reason why Houlton Band is unfairly prejudiced by the resolution of the question at the motion to dismiss (as opposed to the summary judgment) stage.

[8] Houlton Band relies on the unpublished First Circuit opinion *Cooper v. Principi, 71 Fed. Appx. 73 (1st Cir. 2003)* in arguing that the defendants are conflating the need that claims arise from the same transaction with the abstractly stated legal issues in dispute. (Am. Compl. 4-5.) Even if it had precedential value, *Cooper* was a case involving two suits brought by an employee

complaining of his termination; it did not involve a declaratory action. If the 1996 litigation was postured in a similar manner and those employees were returning to this court as plaintiffs after a lack of success in the 1996 litigation, Houlton Band could certainly assert a claim preclusion defense based on Cooper's reasoning.

[9] With respect to Houlton Band's argument on this score it argues that the MHRC is engaged only in "*similar* conduct" to that involved in the 1997 action. (Opp'n Mot. Dismiss at 5.) Given that Houlton Band sought a declaration that the MHRC lacks jurisdiction over complaints of unlawful employment discrimination against Houlton Band (1996 Compl. ¶ 28(D)) and asked the Court to permanently enjoin the MHRC from asserting jurisdiction over any future complaints of unlawful employment discrimination against it (id. ¶ 28(E)) it may well be that it is judicially estopped from taking its current position. See *New Hampshire v. Maine, 532 U.S. 742, 748-51, 121 S. Ct. 1808, 149 L. Ed. 2d 968 (2001).*

[10] On this score I note that Houlton Band is the party pursuing a suit that would reach beyond the particular employment dispute -- protecting Houlton Band's conduct long past the current judgment. I further note, with respect to a concern that there can be no challenge to precedent that is thrown into doubt by subsequent decisions, that there are avenues open to a litigant seeking to revisit the holding. For one, if a Houlton Band employee wants to bring an action under the MHRA he or she can file an action and any decision of this Court in this declaratory action would not be binding. Second, as Houlton Band asserts and I discuss

below, it is possible to raise a change-in-the-law argument in the context of a declaratory action.

[11] I realize that Lawlor added that its conclusion was "unaffected by the circumstance that the 1942 complaint sought, in addition to treble damages, injunctive relief which, if granted, would have prevented the illegal acts now complained of," *id. at 328*, observing that a "combination of facts constituting two or more causes of action on the law side of a court does not congeal into a single cause of action merely because equitable relief is also sought." *Id. at 328-29*. However, in my opinion the claim preclusion issues arising from the two declaratory relief actions by the Houlton Band seeking permanent declaratory and injunctive relief against the MHRC apropos the Commission's investigation with respect to employee MHRA claims (regardless of what facts and legal theories those claims might be predicated upon) are simply not answered by *Lawlor*. It seems to me that *Lawlor* would be relevant if the 1996 action was brought by employees seeking redress (including injunctive relief) for employment discrimination, say in a class action, and some of the same employees returned with similar claims based on alleged post-1996 discrimination by Houlton Band.

[12] Briefly, with respect to issue preclusion or collateral estoppel, the First Circuit has explained:

> The principle of collateral estoppel, or issue preclusion, bars relitigation of any factual or legal issue that was actually decided*Dennis v. Rhode Island Hospital Trust Nat'l Bank, 744 F.2d [26,] 899 (1st Cir. 1994)]* (quoting *Restatement (Second) of Judgments, § 27* (1982))

> (emphasis in original). When there is an identity of the parties in subsequent actions, a party must establish four essential elements for a successful application of issue preclusion to the later action: (1) the issue sought to be precluded must be the same as that involved in the prior action; (2) the issue must have been actually litigated; (3) the issue must have been determined by a valid and binding final judgment; and (4) the determination of the issue must have been essential to the judgment. See *NLRB v. Donna-Lee Sportswear Co., Inc., 836 F.2d 31, 34 (1st Cir. 1987)*; *In re Sestito, 136 B.R. 602, 604 (Bankr.D.Mass.1992)*; *In re Dubian, 77 B.R. 332, 337 (Bankr.D.Mass.1987)*. An issue may be "actually" decided even if it is not explicitly decided, for it may have constituted, logically or practically, a necessary component of the decision reached in the prior litigation. *Dennis, 744 F.2d at 899* (emphasis in original).

*Grella v. Salem Five Cent Sav. Bank, 42 F.3d 26, 30-31 (1st Cir. 1994).*

Should the Court disagree with the grounds for my recommended claim-preclusion based disposition, then consideration should be paid to the arguments on both sides on this question.

[13] I have tried to carefully read Houlton Band's argument with respect to Count Two to discern the anatomy of this claim to immunity it presses. As best as I can tell, Houlton Band is claiming the same form of sovereign immunity it claimed in the 1996 litigation but distinguishes the claim in this case only on the grounds

that the 1996 assertion purportedly was only an assertion of immunity for court proceedings whereas the current assertion is for administrative proceedings. As, I indicate above, given the fact that the claims were in an administrative posture when Houlton Band filed its 1996 action and the manner in which the Court addressed the interests at stake, I have concluded that the decision addressed and answered the question as to whether it could assert a right to sovereign immunity as to the MHRC's administrative proceedings, as well as any potential involvement of the MHRC in a formal judicial proceeding.

Houlton Band has not articulated a claim that it can assert a defense of sovereign immunity on a case-by-case basis, despite the operation of *25 U.S.C. § 1725(a)*, on a theory that it, as a sovereign, enjoys an immunity from a suit for monetary damages akin to that of the United States or, even, a state under the *Eleventh Amendment*. If it did have the ability to assert such a defense then the question of preclusion would not be a roadblock as this type of sovereign immunity defense can be asserted or waived on a case-by-case basis without prejudice to later litigation. Although the question of the sustainability of such a defense is an interesting one, as the dispute presently stands it would be of no avail as there is no suit for money damages against Houlton Band at issue here (Zetts has not filed a civil action) and this ilk of sovereign immunity is not a defense to injunctive or declaratory relief.

[14] The Band relies upon this case to support its argument in favor of rejecting both the arguments of claim preclusion and issue preclusion advanced by the

State. Although the case is an issue preclusion case -- and principles of res judicata/claim preclusion may raise different concerns than principles of collateral estoppel/issue preclusion with respect to intervening changes in the law -- I see no reason why Houlton Band cannot raise a change in the law argument in response to the defendants' claim preclusion argument. My point here is that the legal landscape regarding the statutory language of MICSA and the MIA has not changed appreciably since Judge Brody's decision, which, in my view, was correctly decided then and remains a correct statement of statutory construction today. I have restated significant portions of that decision at the beginning of this recommended decision and I see no reason to attempt to redo that analysis.

[15] Houlton Band also cites to a decision I rendered, *Aroostook Band of Micmacs v. Ryan, 403 F. Supp. 2d. 114 (D. Me. 2005)* (Kravchuk, Magis. J., by consent), which is now on appeal to the First Circuit. This opinion would not be precedent in support of Houlton Band's contention that preclusion is inappropriate in this case.

On this score, I have reviewed the argument for and against granting the defendants' motion on the merits, as an alternative to granting on the grounds of preclusion. In my opinion all the meaningful portions of the 1997 opinion are not assailable on the grounds pressed by Houlton Band. (See Opp'n Mot. Dismiss at 13 -20.) Should the Court conclude that the defendants are not entitled to dismissal on the preclusion argument, the Court would need to address Houlton Band's argument that dismissal on the merits is inappropriate and that the case would somehow await resolution through a summary judgment motion. It is

my opinion the resolution of the substantive merits of the defendants' argument requires answering questions of law-largely a matter of statutory interpretation -- and is in no way dependent on a summary judgment factual record. The State defendants have included chunks of legislative record/history here which I have largely ignored because this is a motion to dismiss. However, I see no reason for allowing this case to proceed to the summary judgment stage because a record consisting of competing legislative pronouncements will solve nothing. Are we to have a trial because there are disputed facts about what Congress really intended ? Should the Court reject the defendants' preclusion defense, in my opinion the motion to dismiss should be decided on the merits because it turns on a question of law regarding the meaning of the statutory enactment.

[16] The plaintiff concedes the sufficient identicality of the parties for purposes of claim preclusion. Accordingly, the fact that this complaint lists the executive director, members of the commission, and the attorney general by name -- rather than naming the Maine Human Rights Commission and the State of Maine as defendants as did the 1996 complaint -- is of no import.

(any footnotes trail end of each document)
Nos. 06-1127, 06-1358

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

AROOSTOOK BAND OF MICMACS,
Plaintiff, Appellee,

v.

PATRICIA E. RYAN, in her official capacity as Executive Director of the Human Rights Commission of the State of Maine; WARREN C. KESSLER, in his official capacity as member of the Human Rights Commission of the State of Maine; PAUL K. VESTAL, JR., in his official capacity as member of the Human Rights Commission of the State of Maine; JAMES VARNER, in his official capacity as member of the Human Rights Commission of the State of Maine; JADINE R. O'BRIEN, in her official capacity as member of the Human Rights Commission of the State of Maine; KRISTEN L. AIELLO, in her official capacity as member of the Human Rights Commission of the State of Maine; LISA GARDINER; TAMMY CONDON, Defendants, Appellants,
BEVERLY AYOOB, Defendant.

April 17, 2007, Decided

As Amended, June 19, 2007.

COUNSEL: Christopher C. Taub, Assistant Attorney General, with whom G. Steven Rowe, Attorney General, and Paul Stern, Deputy Attorney General,

were on brief, for appellants Ryan, Kessler, Vestal, Varner, O'Brien, and Aiello.

Matthew S. Keegan, with whom Johnson & Webbert, LLP was on brief, for appellants Gardiner and Condon.

Douglas J. Luckerman, with whom Law Office of Douglas J. Luckerman, Gregory P. Dorr, Farrell, Rosenblatt & Russell, and David Kaplan were on brief, for appellee.

Michael A. Duddy and Kelly, Remmel & Zimmerman on brief for Houlton Band of Maliseet Indians, amicus curiae.

JUDGES: Before Lynch, Circuit Judge, Campbell, Senior Circuit Judge, and Lipez, Circuit Judge. LIPEZ, Circuit Judge, dissenting.

OPINION BY: LYNCH

OPINION

LYNCH, *Circuit Judge*. This case arises from a lawsuit brought by the Aroostook Band of Micmacs ("Aroostook Band"), an Indian tribe based in northern Maine. The tribe seeks to enjoin proceedings before the Maine Human Rights Commission ("the Commission"), a state agency which acted on discrimination complaints it had received from three of the tribe's former employees.

The Aroostook Band claims that federal law prevents an agency of the state of Maine from enforcing state employment discrimination laws against the Aroostook Band's government. The state disagrees and argues

that federal law specifically grants it this power. Both sides discuss a series of federal and state statutes: the state's 1979 Act to Implement the Maine Indian Claims Settlement ("state Settlement Act"), Me. Rev. Stat. Ann. tit. 30, §§ 6201-6214; the federal Maine Indian Claims Settlement Act of 1980 ("MICSA" or "federal Settlement Act"), 25 U.S.C. §§ 1721-1735; the 1989 state Micmac Settlement Act ("state Micmac Act"), Me. Rev. Stat. Ann. tit. 30, §§ 7201-7207; and the 1991 federal Aroostook Band of Micmacs Settlement Act ("ABMSA" or "federal Micmac Act"), Pub. L. No. 102-171, 105 Stat. 1143 (codified at 25 U.S.C. § 1721 note). This case turns on the interpretation of these statutes.

The magistrate judge, presiding with the consent of the parties, *see* Fed. R. Civ. P. 73(b), concluded that the 1991 ABMSA gives the Aroostook Band the protection it claims.

We reverse. We hold that a provision of the 1980 MICSA, 25 U.S.C. § 1725(a), clearly makes the Aroostook Band "subject to . . . the laws of the State . . . to the same extent as any other person." This abrogates any aspects of tribal immunity which might have prevented application of Maine's employment laws to the dispute here. We also hold that the later-enacted ABMSA is not in conflict with, nor has it implicitly repealed, § 1725(a). We finally hold that the question in this case is resolved by these two federal statutes -- both of which are settlement acts -- and not by Indian common law.

## I. BACKGROUND

We start with the history behind the enactment of the state and federal Settlement Acts, and the later state and federal Micmac Acts. We then move to the background and procedural history of the events that led to this appeal. Much of the background, statutory and otherwise, is also recounted in an earlier opinion in this case. *See Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 50-55 (1st Cir. 2005) ("*Aroostook II*"), *overruled in part by Narragansett Indian Tribe v. Rhode Island*, 449 F.3d 16, 24-25 (1st Cir. 2006)(en banc).

A. The Statutory Background

In the 1970s, two Maine Indian tribes -- the Penobscot Nation and the Passamaquoddy Tribe -- filed suit and claimed ownership over much of the land in the state of Maine. *See id.* at 53; *Penobscot Nation v. Fellencer*, 164 F.3d 706, 707 (1st Cir. 1999). *See generally Joint Tribal Council of the Passamaquoddy Tribe v. Morton*, 528 F.2d 370 (1st Cir. 1975) (providing additional background on the litigation).

With the assistance of the federal government, the Penobscots and the Passamaquoddy ultimately reached a settlement with the state. *Aroostook II*, 404 F.3d at 53. The first step in this settlement was Maine's passage of its state Settlement Act in 1979. *See* 1979 Me. Laws 2393; *see also Aroostook II*, 404 F.3d at 53. Among other things, that act set out to define the legal relationship between Maine and its Indian tribes. One general provision states that except as otherwise provided by the act, all Indian tribes "shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person." Me. Rev. Stat. Ann. tit. 30, § 6204.

For shorthand, we use the phrase "Maine law" to refer to the provisions invoked by the "subject to" clause.

Another part of the statute deals specifically with the two tribes that had then filed suit; it provides that the Penobscot Nation and the Passamaquoddy Tribe have the powers and limitations of Maine municipalities, and are "subject to the laws of the State," except that the State does not have the power to regulate "internal tribal matters." *Id.* § 6206(1). By its terms, that exception in the state act does not apply to any other tribe.

The Aroostook Band, which had not filed suit or asserted any claim, is not mentioned anywhere in the state Settlement Act. However, another Maine tribe, the Houlton Band of Maliseet Indians ("Houlton Band"), is mentioned in several places. Although by 1979 the small Houlton Band had not filed suit against the state, it too was asserting that it had valid claims to parts of land in Maine. *See id.* § 6202. Nevertheless, at that time Maine was "reluctant to accord [the Houlton Band] special status," *Aroostook II*, 404 F.3d at 54, and the Houlton Band was not originally included in the compromise. Indeed, the state Settlement Act does not by its terms grant the Houlton Band any of the benefits that it grants the Penobscots and Passamaquoddy. In its section on legislative purposes, the state Settlement Act declares that in contrast to the arrangement with the Passamaquoddy and the Penobscots, "[t]he Houlton Band . . . will be wholly subject to the laws of the State." Me. Rev. Stat. Ann. tit. 30, § 6202.

The next step was the 1980 passage of MICSA, the federal Settlement Act. *See* Pub. L. No. 96-420, 94 Stat.

1785. A stated purpose of the Congress enacting MICSA was to "ratify" the state Settlement Act. 25 U.S.C. § 1721(b)(3). Even so, MICSA differs from its state counterpart in several respects, including the fact that MICSA grants some benefits to the Houlton Band. Like the state act, MICSA does not mention the Aroostook Band by name, but it does address issues relevant to all Maine tribes.

MICSA extinguished the land claims of *all* Indian tribes in Maine, by express provision. *Id.* § 1723. In exchange, MICSA gave several benefits to the Passamaquoddy, Penobscots, and Houlton Band, including federal recognition for all three tribes and eligibility for certain federal Indian programs. *See id.* § 1725(i). MICSA also created a sizable trust fund for the three tribes to use for acquiring land. *Id.* § 1724(d). Of the money in the fund, $ 26.8 million was for the Passamoquoddy's benefit, $ 26.8 million was for the benefit of the Penobscots, and $ 900,000 was for the benefit of the Houlton Band. *Id.*

Several MICSA provisions deal with the relationship between all Maine tribes and state law. Here the statute draws distinctions. As does the state Settlement Act, MICSA treats Maine's relationship with the Passamoquoddy and Penobscots differently from Maine's relationship with all other tribes. MICSA states that

*all* Indian[] . . . tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe [and] the Penobscot Nation, . . . shall be subject to the civil and criminal jurisdiction of the State [and] the laws of the

State . . . to the same extent as any other person . . . therein.*Id.* § 1725(a) (emphasis added).[1]

A separate subsection of the federal MICSA deals with the applicability of Maine law to the Passamaquoddy and Penobscots; that subsection expressly references the state Settlement Act and declares that "that Act is hereby approved, ratified, and confirmed." *Id.* § 1725(b)(1).

In the late 1980s, there was further legislative action. The Aroostook Band, after meeting with counsel, determined that it too might have had a potential land claim before the passage of the 1979 and 1980 state and federal settlement acts. *See Aroostook II*, 404 F.3d at 54. MICSA's language had, however, extinguished any potential land claim. The Aroostook Band nevertheless opened a dialogue with the state. After negotiations, the Maine legislature passed the state Micmac Act. *See* 1989 Me. Laws 230.

The terms of the state Micmac Act gave the Aroostook Band a status similar to that accorded the Houlton Band, and different from the status given the Penobscots and Passamaquoddy. *Aroostook II*, 404 F.3d at 54. The Houlton Band, mentioned explicitly in the two prior settlement acts, had been expressly made "subject to the civil and criminal jurisdiction of the State [and] the laws of the State . . . to the same extent as any other person . . . therein." 25 U.S.C. § 1725(a). As for the Aroostook Band, the state Micmac Act provided that "[e]xcept as otherwise provided in this Act, the Aroostook Band of Micmacs . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent

as any other person. . . therein." Me. Rev. Stat. Ann. tit. 30, § 7203. Another provision stated that, unlike the Passamaquoddy and the Penobscots, "[t]he Aroostook Band of Micmacs shall not exercise nor enjoy the powers, privileges and immunities of a municipality." *Id.* § 7205.

The parties now dispute whether the state Micmac Act actually took effect as a matter of state law. The Aroostook Band argues that the state Micmac Act is ineffective under state law, so the clauses of that Act, cited above, do not apply and the Aroostook Band is not subject to state law.[2] For reasons we describe later, we think this dispute over state law is not material.

As of the early 1990s, all of the concerned entities apparently treated the state Micmac Act as validly enacted. Accordingly, their next step was to persuade Congress to enact ABMSA, the federal Micmac Act. Congress did so in 1991. *See* Pub. L. No. 102-171, 105 Stat. 1143. The terms of the federal ABMSA, and the effect that they have on the earlier-enacted federal MICSA, are at the heart of the resolution of this case.

ABMSA declares, in its findings section, that the Aroostook Band was not referred to in MICSA because in 1980 there had been insufficient historical evidence of the tribe's presence in Maine. ABMSA § 2(a)(2). That documentation had become available, *id.* § 2(a)(3), and so Congress decided that it was "now fair and just" to give the Aroostook Band "the same settlement provided to the Houlton Band" in MICSA, *id.* § 2(a)(5). ABMSA also states that one of its purposes is to "ratify the [state Micmac Act], which defines the relationship

between the State of Maine and the Aroostook Band of Micmacs." *Id.* § 2(b)(4).

Among other provisions, ABMSA provided the Aroostook Band with a $ 900,000 land acquisition fund, *see id.* §§ 4(a), 10, gave the Aroostook Band federal recognition, *see id.* § 6(a), and authorized the Aroostook Band to "organize for its common welfare and adopt [a governing] instrument," *see id.* § 7(a). ABMSA applies federal law to the Aroostook Band in the same manner as MICSA applied federal law to the other three Maine tribes. *Id.* § 6(b). However, as to the application of Maine law, ABMSA does not repeat the language of the state Micmac Act, nor does it repeat the language of MICSA. It has no language directly on this topic at all. *See Aroostook II*, 404 F.3d at 55. ABMSA does empower the State and the Aroostook Band to reach their own agreement regarding Maine's jurisdiction over tribal lands, *see* ABMSA § 6(d), but it appears that no agreement has yet been reached that would be relevant to this case.

ABMSA also contains a "conflicts" provision: it states that if there is "a conflict of interpretation between the provisions of the [state Settlement Act, state Micmac Act, or MICSA] and this Act, the provisions of this Act shall govern." *Id.* § 11.

B.The History of this Litigation: The Maine Law Discrimination Claims Against the Aroostook Band

During 2001 and 2002, the Aroostook Band fired three of its employees: Lisa Gardiner, Tammy Condon, and Beverly Ayoob. Gardiner was the Band's Chief Financial Officer, Condon was its Compliance Officer,

and Ayoob was its Housing Director. *Aroostook II*, 404 F.3d at 50. Gardiner and Condon alleged that they had been the victims of employment discrimination on the basis of their race, color, and national origin, in violation of the Maine Human Rights Act (MHRA), Me. Rev. Stat. Ann. tit. 5, §§ 4551-4634, and that they had been unlawfully retaliated against in violation of the MHRA and the Maine Whistleblowers' Protection Act (MWPA), Me. Rev. Stat. Ann. tit. 26, §§ 831-840.[3] *Aroostook II*, 404 F.3d at 51. Ayoob also alleged she had been the victim of unlawful discrimination and retaliation under these statutes. *Id.* All three filed complaints with the Commission, a state agency which investigates discrimination charges, *see* Me. Rev. Stat. Ann. tit. 5, § 4566. *Aroostook II*, 404 F.3d at 51. In all three cases, the Commission in turn filed charges with the United States Equal Employment Opportunity Commission. *Id.* The Aroostook Band asked the Maine Commission to dismiss the complaints, arguing that the Commission had no jurisdiction over the Band. *Id.* The Commission refused, and it investigated the complaints. *Id.*

The Aroostook Band then filed suit in U.S. District Court against the Commission's members, and against Condon, Gardiner, and Ayoob. *Id.* at 51-52. It sought declaratory and injunctive relief, asserting five claims: 1) that ABMSA and/or the Aroostook Band's inherent sovereignty prohibited the Commission from enforcing the state MHRA and MWPA against it, 2) that the Aroostook Band's sovereign immunity[4] achieved the same result, 3) that the Aroostook Band was statutorily exempt from Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e to 2000e-17, 4) that Title VII preempts application of the state MHRA and MWPA

against an Indian tribe, and 5) that the Aroostook Band was not an "employer" within the meaning of either the state MHRA or MWPA statutes.

The magistrate judge initially dismissed all claims for lack of federal jurisdiction under Rule 12(h)(3). *See Aroostook Band of Micmacs v. Executive Dir. Me. Human Rights Comm'n*, 307 F. Supp. 2d 95, 96 (D. Me. 2004) ("*Aroostook I*"). A panel of this court reversed on the grounds that the first four claims were properly brought in federal court. *See Aroostook II*, 404 F.3d at 67, 69, 71, 73. The panel remanded all five claims, as there was possible pendent jurisdiction over the final state law claim. *See id.* at 73; *see also* 28 U.S.C. § 1367.

Part of the panel's opinion found that there was a distinction between tribal sovereign immunity and inherent tribal authority. *See Aroostook II*, 404 F.3d at 67-68. That part of the opinion was later overruled by this court's en banc opinion in *Narragansett*. 449 F.3d at 24-25.

On remand, the magistrate judge considered the merits of both parties' motions for summary judgment. Judgment was entered for the Aroostook Band on its first claim: that ABMSA and/or inherent sovereignty protects the tribe's employment decisions from Maine law. *See Aroostook Band of Micmacs v. Ryan*, 403 F. Supp. 2d 114, 130 (D. Me. 2005) ("*Aroostook III*"). The magistrate judge's decision predated the issuance of our en banc opinion in *Narragansett*.

The magistrate judge's reasoning had two primary parts. First, the magistrate judge concluded that the state Micmac Act, with its language subjecting the

Aroostook Band to state law, had never taken effect. *Id.* at 119-22. This failure to become effective, the judge held, was not cured by ABMSA, even though the federal act stated it was ratifying its state counterpart.

*Id.* at 122-23.

Second, the magistrate judge concluded that while MICSA had subjected the Aroostook Band to Maine law, this aspect of MICSA was effectively and impliedly abrogated by two provisions in ABMSA: the grant of federal recognition to the Aroostook Band in § 6(a), and the authorization in § 7(a) for the Aroostook Band to organize its government. *Id.* at 124-30. Both provisions of ABMSA, the magistrate judge held, were in conflict with MICSA, and the conflicts were resolved in the Aroostook Band's favor pursuant to ABMSA's § 11. *Id.* at 124-26.

The magistrate judge permanently enjoined the Commission defendants from applying the MHRA and MWPA to the Aroostook Band, *id.* at 133, and also issued a declaratory judgment to similar effect against Gardiner, Condon, and Ayoob.[5] The Commission defendants and defendants Gardiner and Condon all appealed. We consolidated the appeals, and we now reverse.

## II. AN OVERVIEW

We review de novo the magistrate judge's disposition of the cross-motions for summary judgment. *Jalbert Leasing, Inc. v. Mass. Port Auth.*, 449 F.3d 1, 2 (1st Cir. 2006).

There are several major strands to the Aroostook Band's argument. First, the Aroostook Band argues that MICSA did not subject the tribe's government to state employment law. Second, even if MICSA did have this effect, the tribe contends that this aspect of MICSA was abrogated by and is in conflict with ABMSA. Throughout, the Aroostook Band interprets the relevant statutes in light of its notions of inherent tribal sovereignty, as protected under federal Indian common law.

The precise question we face is whether Maine is precluded from applying its employment statutes when these statutes permit individuals employed by the Aroostook Band's government to file and pursue discrimination complaints with the Commission and through any judicial review thereafter. While the parties have argued in broad terms before us, that is the narrow issue that we decide.[6]

Our conclusion is that this dispute is resolved in Maine's favor based on two federal statutes, MICSA and ABMSA, both of which were statutes designed to settle Indian claims. These settlement acts displaced any federal common law that might otherwise bear on this dispute. MICSA clearly and unequivocally establishes that Maine law applies to the Aroostook Band. And ABMSA does not either explicitly or implicitly conflict with or override MICSA on this point. It instead reinforces this aspect of MICSA.

Whether or not the state Micmac Act ever became effective under state law is not an issue we need to decide. As a federal court, we would be reluctant in any event to decide such a difficult and complex issue of

state law without guidance from Maine's Supreme Judicial Court. Our analysis and the resolution of these issues turn entirely on federal law.

## III. MICSA'S EFFECT ON THE AROOSTOOK BAND

### A. MICSA's Text

Maine relies on MICSA's language to support its argument that MICSA subjected the Aroostook Band to state employment law. Specifically, MICSA declares that

> all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by any such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.25 U.S.C. § 1725(a). By its clear terms, § 1725(a) makes all Maine tribes, other than the Passamaquoddy Tribe and the Penobscot Nation, "subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State."[7]

The Aroostook Band argues that even while MICSA made it "subject to . . . the laws of the State," the

statute did not go so far as to subject the *internal tribal matters* of the Aroostook Band to state law.[8] It contends that it retains authority over these matters as part of its inherent tribal sovereignty. We discuss in a later section why Congress's intent in MICSA to ratify the state Settlement Act, grouped with that state statute's treatment of "internal tribal matters," defeats this claim. But in this section we also provide several other reasons to reject the argument.

1. *Statutory Clarity and the Abrogation of Sovereignty*

The Aroostook Band relies on rules of statutory construction that "obligate us to construe 'acts diminishing the sovereign rights of Indian tribes . . . strictly,' 'with ambiguous provisions interpreted to the [Indians'] benefit.'" *Fellencer*, 164 F.3d at 709 (ellipsis and alteration in original) (internal citations omitted) (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994); *County of Oneida v. Oneida Indian Nation*, 470 U.S. 226, 247, 105 S. Ct. 1245, 84 L. Ed. 2d 169 (1985)). The Aroostook Band asserts that prior to MICSA's enactment, it had the power to control all of its own employment matters as part of its inherent sovereignty. It contends that, judged against a backdrop of federal common law protecting Indian sovereignty, *see Rhode Island*, 19 F.3d at 701, MICSA was not clear enough to subjugate this aspect of the tribe's sovereignty to Maine law.

We disagree. Whatever powers are included within "inherent tribal authority," Congress may abrogate those powers by statute. *See United States v. Lara*, 541 U.S. 193, 200, 124 S. Ct. 1628, 158 L. Ed. 2d 420 (2004); *Washington v. Confederated Bands & Tribes of the*

*Yakima Indian Nation*, 439 U.S. 463, 470-71, 99 S. Ct. 740, 58 L. Ed. 2d 740 (1979). Although Congress must do so clearly, "there is no requirement that talismanic phrases be employed. Thus, an effective limitation . . . need not use magic words." *Narragansett*, 449 F.3d at 25.[9]

MICSA is clear. In § 1725(a) it not only made Maine Indians "subject to . . . the laws of the State," and "subject to the civil and criminal jurisdiction of the State," but it expressly added the emphasizing phrase "to the same extent as any other person." And § 1725(a) not only applies to "Indians," but also to the "Indian nations, . . . tribes[, and] bands of Indians" themselves. Short of using "magic words," it is hard to imagine how § 1725(a) could have been clearer. There is no "internal tribal matters" exception in the statute.

The Aroostook Band tries to interpret this clear statement by Congress as nevertheless exempting specific units of tribal government. Aided by the Houlton Band as amicus, the Aroostook Band sees significance in the fact that § 1725(a) does not apply state law to governing bodies like the Aroostook Micmac Council or the Houlton Band Council. *Cf.* 25 U.S.C. § 1722(a) (stating that the Houlton Band is "represented" by the Houlton Band Council); ABMSA § 3(a) (stating that the Aroostook Band is "represented" by the Aroostook Micmac Council). The inference we are asked to draw is that § 1725(a) applies state law to Maine tribes as "polities" but not to their governments.

This argument lacks merit. It is not a natural reading of the language and it creates an artificial distinction merely to suit tribal purposes. Further, MICSA

recognizes that a governing Council exists as a *representative* of a tribe. *See* 25 U.S.C. § 1722(a). It is the tribe itself, as a legal entity, whose interest in sovereignty is really at issue.[10] *See Ninigret Dev. Corp. v. Narragansett Indian Wetuomuck Hous. Auth.*, 207 F.3d 21, 29 (1st Cir. 2000) (explaining that a tribal housing authority had sovereign immunity because it was "an arm of the [t]ribe"); *Fletcher v. United States*, 116 F.3d 1315, 1324 (10th Cir. 1997) (holding that the members of a tribal government, sued in their official capacities, were protected by sovereign immunity because any relief would "run against the [t]ribe itself"). Under MICSA, § 1725(a) applies state law to "Indian nations, . . . tribes[,] or bands." That is what matters. *See Narragansett*, 449 F.3d at 30 (holding that tribal officers have no sovereign immunity when they engage in activities that the tribe itself cannot lawfully authorize).

Amicus presents another argument why § 1725(a) was not clear in its abrogation of either Houlton or Aroostook tribal sovereignty.[11] Under 25 U.S.C. § 1727(a), the Passamaquoddy and the Penobscots have the opportunity to petition for "exclusive jurisdiction" over certain child custody matters. Amicus contends that the use of "exclusive jurisdiction" here, in contrast with the use of the sole word "jurisdiction" in § 1725(a), means that § 1725(a) merely grants the state "nonexclusive authority and concurrent jurisdiction to apply [s]tate law" to tribes like the Houlton Band and Aroostook Band.

But amicus ignores the fact that elsewhere in MICSA, the Passamaquoddy and the Penobscots were "authorized to exercise jurisdiction, separate and

distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the [state Settlement Act]." *Id.* § 1725(f). No such jurisdictional authorization was provided to the other Maine tribes, and thus we think it would clearly defeat congressional intent to nevertheless imply one. The language about "exclusive jurisdiction" in § 1727(a) is plainly nothing more than a helpful clarification in light of the peculiar jurisdictional status of the Penobscots and Passamaquoddy. It does not turn § 1725(a) into a mere grant of concurrent jurisdiction. The meaning of MICSA's § 1725(a) is clear: Maine law applies to this situation.

2. *Statutory Clarity in Context: Indian Statutes in Supreme Court Case Law*

The Aroostook Band attempts to undercut the clarity of MICSA by comparing it to statutes -- most notably Public Law 280 and the Menominee Indian Termination Act of 1954 -- examined in several Supreme Court cases.

MICSA stands in stark contrast to Public Law 280, Act of Aug. 15, 1953, ch. 505, 67 Stat. 588 (codified as amended at 18 U.S.C. § 1162 and 28 U.S.C. § 1360). Public Law 280 is the statute discussed in *Bryan v. Itasca County*, 426 U.S. 373, 96 S. Ct. 2102, 48 L. Ed. 2d 710 (1976), a case on which the Aroostook Band relies. *Bryan* addressed the part of the statute that gave certain states

jurisdiction over civil causes of action between Indians or to which Indians are parties which arise in . . . Indian country . . . to the same extent that such State has

jurisdiction over other civil causes of action, and those civil laws of such State that are of general application to private persons or private property shall have the same force and effect within such Indian country as they have elsewhere within the State.28 U.S.C. § 1360(a). The Court found this statute did not clearly give states civil regulatory jurisdiction over Indians, and it interpreted the ambiguity for the Indians' benefit by precluding the application of a state property tax. *See Bryan*, 426 U.S. at 392-93.

In finding Public Law 280 ambiguous, the Court relied on reasons that are inapplicable to MICSA's § 1725(a). First, the Court examined Public Law 280's legislative history and concluded that its civil law provisions were primarily designed to address "the lack of adequate Indian forums for resolving private legal disputes." *Id.* at 383; *see also id.* at 379-87. Viewed in this light, when Public Law 280 gave force to "the civil laws of [the] State" pertaining to "private persons or private property," 28 U.S.C. § 1360(a), it was merely providing state rules of decision and a state forum for private disputes, and it was not attempting to infringe more deeply on tribal sovereignty. *Bryan*, 426 U.S. at 383-84. MICSA has no such legislative history, nor does it contain similar language specifically addressed to "private" legal disputes. *Cf. Narragansett*, 449 F.3d at 28 (noting the narrowness of Public Law 280).

More importantly, the Court in *Bryan* stressed that Public Law 280 lacked "any conferral of state jurisdiction over the tribes themselves." 426 U.S. at 389. In contrast, § 1725(a) expressly *does* apply to Indian tribes in addition to their members.

The Aroostook Band also cites to *Menominee Tribe of Indians v. United States*, 391 U.S. 404, 88 S. Ct. 1705, 20 L. Ed. 2d 697 (1968), but *Menominee* does not assist the tribe. *Menominee* involved a federal statute, the Menominee Indian Termination Act of 1954, 68 Stat. 250 (repealed 1973), which stated that "the laws of the several States shall apply to the [Menominee] tribe and its members in the same manner as they apply to other citizens or persons within their jurisdiction." 391 U.S. at 410 (quoting 25 U.S.C. § 899 (repealed 1973)) (internal quotation marks omitted). The Supreme Court refused to read this language as abrogating certain hunting and fishing rights that the Menominee Tribe had obtained in an 1854 treaty. *Id.* at 412-13. The Aroostook Band asks us to reach a comparable result here as it contends that the language in the Termination Act is similar to the language in MICSA.

We disagree and find *Menominee* not only easily distinguishable, but in fact supportive of our reading of MICSA. *Menominee*'s holding is not that the Termination Act *alone* was too unclear to abrogate aspects of tribal sovereignty. Instead, *Menominee* held that the Termination Act needed to be considered in pari materia with Public Law 280, which was contemporaneously passed and which explicitly said it was not interfering with Indian hunting and fishing rights granted by treaty. *Id.* at 410-11. The *combination* of these two statutes created enough ambiguity to favor preservation of Indian rights. With MICSA there is no similar federal statute, passed roughly contemporaneously, that could create a comparable ambiguity. To the contrary, the federal statutory scheme is a consistent whole on the issue in question.

Nor is this the sole fact that distinguishes *Menominee*. For instance, the Termination Act was abrogating a treaty right, which meant that rules of statutory construction favoring Indians were bolstered by the rule that "the intention to abrogate or modify a treaty is not to be lightly imputed to . . . Congress." *Id.* at 413 (quoting *Pigeon River Improvment, Slide & Boom Co. v. Charles W. Cox, Ltd.*, 291 U.S. 138, 160, 54 S. Ct. 361, 78 L. Ed. 695 (1934)) (internal quotation marks omitted). By contrast, this case does not involve any treaty. Additionally, the *Menominee* Court drew support from statements by the Termination Act's chief sponsor; he had declared that the act "'in no way violates any treaty obligation with this tribe.'" *Id.* (quoting 100 Cong. Rec. 8537, 8538 (1954) (statement of Sen. Watkins)). The Aroostook Band has pointed to no legislative history for MICSA that is similarly so on point.

The Supreme Court's decision in *South Carolina v. Catawba Indian Tribe, Inc.*, 476 U.S. 498, 106 S. Ct. 2039, 90 L. Ed. 2d 490 (1986), puts *Menominee* in context and further confirms our reading of MICSA. *Catawba* interpreted a statute virtually identical to the Termination Act in *Menominee*. *See* Catawba Indian Tribe Division of Assets Act, Pub. L. No. 86-622, 73 Stat. 592 (1959) (repealed 1993). That Catawba statute declared: "[T]he [Catawba] tribe and its members shall not be entitled to [certain federal services] . . ., and the laws of the several States shall apply to them in the same manner they apply to other persons or citizens within their jurisdiction." 25 U.S.C. § 935 (repealed 1993); *see also Catawba*, 476 U.S. at 505. Without a contemporaneously passed statute like Public Law 280 to add ambiguity, the Supreme Court found it

"unmistakably clear" that "state laws apply to the Catawba Tribe and its members in precisely the same fashion that they apply to others." *Catawba*, 476 U.S. at 505-06; *see also id.* at 509 n.20 (distinguishing *Menominee* on this basis). MICSA is similarly clear.

3. *Statutory Clarity and The Tribal Employment Rule*

Despite the statutory clarity, and the Supreme Court case law reinforcing this clarity, the Aroostook Band urges us to apply what it calls the "Tribal Employment Rule." What it means by this is that there are a number of cases, all from other jurisdictions and involving differently situated tribes,[12] holding that general *federal* employment statutes do not apply to tribal employers despite these statutes' silence on that issue. *See, e.g., Snyder v. Navajo Nation*, 382 F.3d 892, 894-95 (9th Cir. 2004) (tribal employer exempt from Fair Labor Standards Act); *Taylor v. Ala. Intertribal Council Title IV J.T.P.A.*, 261 F.3d 1032, 1035-36 (11th Cir. 2001) (tribal employer insulated from employment discrimination claim under 42 U.S.C. § 1981); *NLRB v. Pueblo of San Juan*, 280 F.3d 1278, 1286 (10th Cir. 2000) (tribal employer not covered by National Labor Relations Act); *cf.* 42 U.S.C. § 2000e(b) (explicitly providing that for purposes of Title VII, the term "employer" does not include an Indian tribe).

These cases are inapposite. The fact that a tribe may be exempt from federal employment laws says little regarding that tribe's status under state employment laws, particularly where Congress has enacted settlement acts. None of these cases say that tribal employment decisions are somehow insulated from state law in the face of a federal statute that specifically

applies state laws to tribes.[13] We think the "Tribal Employment Rule" is inapplicable in the face of MICSA's clarity.

B. The State Settlement Act and Its Relationship to MICSA

We have held that as a matter of reading MICSA, § 1725(a) clearly subjects the Aroostook Band to Maine law in this situation. That is enough. But because the Aroostook Band relies heavily on notions of equity, we also consider the terms of the state Settlement Act. The terms of that act reinforce our reading of MICSA's language and intent. Indeed, MICSA purported to ratify that state act. *See* 25 U.S.C. § 1725(b)(1); *see also Akins v. Penobscot Nation*, 130 F.3d 482, 485 (1st Cir. 1997) (treating the "internal tribal matters" exception contained in the state Settlement Act as incorporated into federal law).

The state Settlement Act explicitly created an "internal tribal matters" exception for the Passamaquoddy and the Penobscots and *not* for the Houlton Band, the Aroostook Band, or any other Maine tribe. *Compare* Me. Rev. Stat. Ann. tit. 30, § 6204 (providing that "[e]xcept as otherwise provided in this Act, all Indians, Indian Nations, and tribes and bands of Indians in [Maine] . . . shall be subject to the laws of the State . . . to the same extent as any other person"), *with id.* § 6206(1) (providing that "internal tribal matters" of the Passamaquoddy and the Penobscots "shall not be subject to regulation by the state"). MICSA's choice of language echoed the state Settlement Act by providing one legal regime for the Penobscots and Passamaquoddy, and a different regime for other

tribes. *Compare* 25 U.S.C. § 1725(a) (subjecting all Indians in Maine, "other than the Passamaquoddy Tribe, the Penobscot Nation, and their members" to state law to the same extent as any other person), *with id.* § 1725(b)(1) (discussing Maine's jurisdiction over the Penobscots and Passamaquoddy).

The Aroostook Band takes issue with this understanding of the state law. It argues that while the "internal tribal matters" exception in the state Settlement Act refers only to the Penobscots and the Passamaquoddy, the internal matters of *all* Maine tribes are free from state regulation. The Aroostook Band contends that the exception in the statute is "actually a savings clause that preserves certain aspects of inherent tribal sovereignty and self-governance rights that generally apply to all Indian tribes." It posits that such a savings clause was needed for the Penobscots and the Passamaquoddy to clarify their retained sovereignty despite their unique status as municipalities under Maine law. Since the other Maine tribes were not given municipal status, the Aroostook Band argues that no "internal tribal matters" exception was needed for them in the state Settlement Act, so little should be inferred from congressional failure to place such an exception in MICSA.

We disagree with this innovative reading of the state Settlement Act. It is not a rational reading of the language. And the reading is also in tension with our precedent. We have held that the "internal tribal matters" exception has its own unique meaning, and that it does not invoke all of Indian common law.[14] *See Fellencer*, 164 F.3d at 709-13 (treating Indian common law as but one factor in determining whether

something is an "internal tribal matter"); *Akins*, 130 F.3d at 488-90 (same); *see also id.* at 489 (refusing to read the exception "as invoking all of prior Indian law" because "[t]hat would be inconsistent with the unique nature of the Maine settlement"). This is hardly the effect we would expect from a "savings clause."[15]

The Aroostook Band's reading of the exception is also undercut by strong evidence of legislative intent. The state Settlement Act clearly intended to give the Penobscots and the Passamaquoddy more independence from state law than it gave the Houlton Band (the only other Maine tribe that asserted a claim at the time that act was passed). In its findings section, the state Settlement Act declares: "[T]he Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State." Me. Rev. Stat. Ann. tit. 30, § 6202. It would be illogical to conclude that the Houlton Band had received the same exemptions from state law that had been granted to the two larger tribes. And if the Houlton Band was not given these exemptions, certainly the Aroostook Band did not receive them either.[16]

## IV. THE STATUS OF THE AROOSTOOK BAND UNDER ABMSA

In the previous section, we concluded that MICSA clearly subjected the Aroostook Band to state employment laws -- a conclusion we reached both from MICSA's language and from its context in relation to the state Settlement Act. "[W]hen two statutes are

capable of co-existence, it is the duty of the courts, absent a clearly expressed congressional intention to the contrary, to regard each as effective." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974). We think that MICSA and the later-enacted ABMSA are capable of co-existence, and there is no clearly expressed congressional intention that ABMSA makes Maine law inapplicable here despite MICSA's language.

The Aroostook Band's argument to the contrary proffers two ABMSA provisions as conflicting with MICSA: § 6(a), which gives the Aroostook Band federal recognition, and § 7(a), which authorizes the Aroostook Band to adopt a governing instrument and organize for its common welfare. When read alongside ABMSA § 11, the conflicts provision, the Aroostook Band believes that ABMSA codifies the tribe's inherent sovereignty and insulates its employment decisions from state law. In an attempt to reinforce its reading of §§ 6(a) and (7)(a), the Aroostook Band also appears to argue that ABMSA impliedly repeals parts of MICSA. We disagree with these arguments. Additionally, we disagree with the repeal argument that is offered by our dissenting colleague (and that was not advanced by the Aroostook Band).

A. Section 6(a): Federal Recognition

The Aroostook Band contends that when ABMSA gave it federal recognition, it used a "term of art" that entitles the tribe to a variety of privileges and immunities.[17] *Cf.* 25 C.F.R. § 83.2 (explaining that recognition means that a "tribe is entitled to the immunities and privileges available to other federally

acknowledged Indian tribes by virtue of their government-to-government relationship with the United States"). Among those privileges, we are told, is freedom from the application of state law.

We flatly reject the argument. MICSA contains express terms to the contrary. It gave the Penobscots and the Passamaquoddy "federal recognition," *see* 25 U.S.C. § 1725(i), and yet those tribes are subject to limits that do not apply to other federally recognized tribes. *See Akins*, 130 F.3d at 485, 489. *Compare* 25 U.S.C. § 1724(e) (placing restrictions on the authority of the United States to take land into trust on behalf of Maine tribes), *with id.* § 465 (giving the Secretary of the Interior discretion to take lands into trust on behalf of Indian tribes).[18] Moreover, even though MICSA recognized the Houlton Band, it plainly subjected that tribe to state law to a greater extent than it subjected the Penobscots and Passamaquoddy. To interpret "recognition" as a grant of sovereignty would require us to undo this differing treatment.

Indeed, it is hard to see how the Congress that enacted MICSA intended recognition to be a "grant" of sovereignty at all. That Congress understood Maine tribes to be able to invoke sovereign powers even without recognition: our court had decided as much in *Bottomly v. Passamaquoddy Tribe*, 599 F.2d 1061, 1064-66 (1st Cir. 1979), and Congress was plainly aware of our holding, *see* H.R. Rep. No. 96-1353, at 14 (1980), *reprinted in* 1980 U.S.C.C.A.N. 3786, 3790 (noting *Bottomly*'s holding regarding inherent sovereignty); S. Rep. No. 96-957, at 14 (1980) (same).

Thus we understand "recognition," at least as used in

MICSA, to be merely an acknowledgment that the Passamaquoddy, the Penobscots, and the Houlton Band are eligible for particular federal tax treatment and benefits. It is telling that MICSA only grants federal recognition as part of two sentences dealing with financial benefits and taxes:

As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be treated in the same manner as other federally recognized tribes for the purposes of Federal taxation and any lands which are held by the respective tribe, nation, or band . . . shall be considered Federal Indian reservations for purposes of Federal taxation.25 U.S.C. § 1725(i).

We have no reason to think that ABMSA's grant of "recognition" used a "term of art" that meant something different from MICSA's use of the term. Like the similar provision in MICSA, ABMSA § 6(a) grants recognition as part of a provision discussing federal financial benefits.[19] Although there are small differences in wording, those differences cannot plausibly be read as relevant to the Aroostook Band's claimed exemption from employment laws, and the Aroostook Band does not so argue.

B. Section 7(a): Government Organization and

Documents

The Aroostook Band also points to ABMSA § 7(a) as "affirming" the Aroos took Band's right to "self-governance." The Aroostook Band infers that, as a result, it is not subject to state laws in this case. Section 7(a) states:

The [Aroostook] Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act. The Band shall file with the Secretary a copy of its organic governing document and any amendments thereto.The Aroostook Band reads this language as allowing it "to determine the structure and internal operations of [its] governing body," a power which it contends gives it an exemption from state employment law.

We disagree with this extremely broad reading. First, by its plain terms, § 7(a) says nothing about conferring an exemption from state laws. It merely allows the Aroostook Band to "organize for its common welfare" and "adopt an appropriate instrument in writing to govern [tribal] affairs." The language cannot be read to exclude the Aroostook Band from discrimination suits brought by former employees.

Second, our view is strengthened by comparing § 7(a) to a similar provision in MICSA. Section 7(a) is clearly based on virtually identical language contained in MICSA's § 1726(a). That subsection stated:

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of [this act] and the [state Settlement Act]. The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall each file with the Secretary a copy of its organic governing document and any amendments thereto.25 U.S.C. § 1726(a). If we were to accept the Aroostook Band's argument about the meaning of this language, we would be forced to conclude that § 1726(a) acted to exempt the Houlton Band from the provisions of § 1725(a) (which applies Maine law to the Houlton Band).[20] That conclusion fails on the face of the statute itself: § 1725(a) contains several exceptions for other MICSA provisions, and § 1726(a) is not one of them.

Indeed, the Aroostook Band's argument amounts to a claim that ABMSA § 7(a) (and MICSA's § 1726(a)) provide the functional equivalent of the "internal tribal matters" exception granted to the Passamaquoddy and the Penobscots. They plainly do not. Congress invoked different language, and it intended different treatment of the Passamaquoddy and Penobscots on the one hand, and the remaining Maine tribes on the other.[21]

While it is not necessary to consult legislative history at all, that history reveals that MICSA's § 1726(a) -- and thus ABMSA § 7(a) -- cannot be read as the equivalent of the "internal tribal matters" exception. Rather, the language in § 1726(a) was meant to serve an entirely

different purpose. The language was added at the suggestion of the Secretary of the Interior, Cecil Andrus, who saw a "conceptual problem" with the fact that the Penobscots and the Passamaquoddy were given municipal status under the state Settlement Act. *See Proposed Settlement of Maine Indian Land Claims: Hearings on S. 2829 Before the S. Select Comm. on Indian Affairs*, 96th Cong. 38 (1980) [hereinafter *MICSA Senate Hearings*] (statement of Secretary Andrus). Maine municipalities derive their authority from charters, and Secretary Andrus noted that the tribes would have no charters, constitutions, or other governing documents. *Id.* at 37-38. Additionally, because the tribes were going to have large land holdings, the Secretary thought it advisable that they adopt organic governing documents, and that these be on file with the Department of the Interior. *See* Letter from Cecil D. Andrus, Secretary, United States Department of the Interior, to John Melcher, Chairman, Senate Select Committee on Indian Affairs (Aug. 8, 1980), *reprinted in MICSA Senate Hearings* at 95, 103. These rationales have nothing to do with inherent sovereignty.[22]

The Aroostook Band disputes this reading of MICSA's legislative history by pointing out that § 1726(a) was based on similar language in the Indian Reorganization Act ("IRA"), Pub. L. No. 73-383, § 16, 48 Stat. 984, 987 (1934) (codified as amended at 25 U.S.C. § 476). *See MICSA Senate Hearings* at 38 (statement of Secretary Andrus) (referring to the IRA). In light of the IRA's clear purpose of furthering tribal self-government, *see Kerr-McGee Corp. v. Navajo Tribe of Indians*, 471 U.S. 195, 199, 105 S. Ct. 1900, 85 L. Ed. 2d 200 (1985), the Aroostook Band contends that § 1726(a) also vests

tribes with "full[] . . . self-governing authority." But this case does not involve construction of the general terms of the IRA. It instead involves the interpretation of more specific laws, whose interpretation we have explained. Indeed, the Aroostook Band has pointed us to no authority interpreting the relevant section of the IRA, § 16, to have the meaning that the tribe urges on us.[23]

C. Remaining ABMSA Arguments

1. *ABMSA as a Repeal of MICSA: The Aroostook Band's Position*

The Aroostook Band makes another argument, designed to advance its claim that ABMSA §§ 6(a) and/or 7(a) give it an exemption from state employment laws. It points to the fact that two ABMSA sections, 6(b) and 8(a), specifically invoke parts of MICSA as applicable to the Aroostook Band. Section 1725(a) is not one of the specifically invoked provisions. The Aroostook Band posits that if Congress had intended § 1725(a) to apply to it as well, then ABMSA would have said so. Otherwise, the Aroostook Band reasons, the specific inclusions in §§ 6(b) and 8(a) would be "meaningless surplusage."[24]

At its core, this is an argument about congressional intent, and it is one that we reject. Courts rarely presume that a statute's failure to invoke a prior statute will reflect an intent to repeal, *see Morton*, 417 U.S. at 549-50, although in an appropriate case this rule can be overcome by the Indian canons of construction, *see, e.g., Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985). In

any event, ABMSA's failure to reference MICSA's § 1725(a), or to repeat that section's language, is easily explained: Congress likely saw no need to do so in light of both MICSA and the state Micmac Act. ABMSA clearly contemplates that the state Micmac Act will have effect. *See* ABMSA § 6(d) (consenting to amendments to that law). And the state Micmac Act contains language nearly identical to MICSA's § 1725(a).[25] The Aroostook Band's reading is implausible.

There is another possible explanation for the failure to reference § 1725(a), but it is also detrimental to the Aroostook Band's argument. The two ABMSA provisions that the Aroostook Band cites for their explicit references to MICSA, §§ 6(b) and 8(a), do not deal with the application of *Maine* law. Instead, both deal with the application of *federal* law. That ABMSA did not specifically repeat § 1725(a) may simply reflect this differing subject matter.

2. *ABMSA as a Repeal of MICSA: The Dissent's Position*

Our dissenting colleague offers a different interpretation of ABMSA. The dissent does not argue that there are provisions in ABMSA that *affirmatively* grant the Aroostook Band sovereign powers. Nor does the dissent dispute our pre-ABMSA reading of MICSA. The dissent even accepts that the Congress that enacted MICSA, the Congress that enacted ABMSA, and the Maine Legislature, never intended to give the Aroostook Band even the relatively narrow protections from state law that the tribe now claims. Nonetheless, the dissent interprets ABMSA to yield the paradoxical conclusion that ABMSA accidentally restored full

sovereign rights to the Aroostook Band -- making it the sole Maine tribe with such extensive independence from state law. We decline to reach a result that we can be fully confident Congress did not intend. *Cf. Griffin v. Oceanic Contractors*, 458 U.S. 564, 575, 102 S. Ct. 3245, 73 L. Ed. 2d 973 (1982) ("[I]nterpretations of a statute which would produce absurd results are to be avoided if alternative interpretations consistent with legislative purpose are available.").

To reach its paradoxical result, the dissent offers the following syllogism. First, the dissent contends that ABMSA essentially repealed MICSA insofar as MICSA dealt with the relationship between Maine law and the Aroostook Band. This is because, in the dissent's view, Congress intended for the state Micmac Act to deal with the issue. Second, the dissent contends that the state Micmac Act never became effective as a matter of state law, due to irregularities in its passage. Third, the dissent argues that despite Congress's allegedly very strong intent for the state Micmac Act to govern this issue, Congress's intent was apparently not quite strong enough for it to have succeeded in ratifying the relevant portions of the state Micmac Act into federal law. Finally, faced with an apparent legal void on the issue, the dissent concludes that the "default option" must necessarily be the full scope of federal Indian common law.

This view of ABMSA diverges significantly from the interpretation offered by the Aroostook Band. Indeed, the dissent goes far beyond the position that the Aroostook Band advocates.[26]

In any event, we disagree with the dissent's view that

ABMSA supplanted MICSA's § 1725(a) insofar as that MICSA provision applied Maine law to the Aroostook Band. Although the dissent acknowledges that we must attempt to construe MICSA and ABMSA consistently unless Congress has clearly expressed otherwise, *see Morton*, 417 U.S. at 551, the dissent nevertheless concludes that ABMSA effects a repeal of the relevant part of MICSA by "explicitly deferring to [the state Micmac Act] on the issue of state jurisdiction." *Post*, at 59.

The dissent first points out that Congress did not simply amend MICSA to add the Aroostook Band, but rather enacted a separate statute. Yet that can hardly carry significant weight -- the fact that Congress enacted a separate statute is the whole reason why we must apply cases like *Morton* and the statutory canons that deal with the effect of a later statute on an earlier one. *See, e.g., Morton*, 417 U.S. at 537 (seeking to determine the effect of a later-enacted statute on a separate earlier-enacted one).

The dissent also finds persuasive the fact that ABMSA §§ 6(b) and 8 specifically reference MICSA, and the dissent concludes that the rest of MICSA must have been intentionally omitted. Yet as we explained above, the fact that ABMSA did not explicitly invoke MICSA's § 1725(a) may well have been because the state Micmac Act contained nearly identical language.

The dissent seizes on this, contending that it demonstrates Congress's belief that § 1725(a) was no longer pertinent. But the dissent's conclusion is too hasty. There is no reason to believe that Congress intended to repeal § 1725(a) *insofar as it provided a*

*default rule* in the event that the state Micmac Act were ineffective for some reason.[27]

Perhaps in recognition of this distinction, the dissent acknowledges that our position would have significant force if MICSA and the state Micmac Act contained identical jurisdictional provisions. Yet the dissent argues that they are not the same because while MICSA's § 1725(d)(1) contains a "sue and be sued" provision, the state Micmac Act does not. Notably, the dissent does not contend that MICSA's § 1725(a) is meaningfully different from its sister provision in the state Micmac Act. Of course, it is § 1725(a), and not § 1725(d)(1), that applies state law to the Aroostook Band in the ways relevant to this appeal.

Furthermore, the dissent's position is internally inconsistent. The dissent concludes that ABMSA "does not directly refer to the State's jurisdiction." *Post* at 67. Yet it also finds that Congress displaced MICSA's allocation of jurisdiction with the state Micmac Act. Because (in the dissent's view) the state Micmac Act was not effective, the dissent assumes that Congress must have preferred a void in the law over a reinstatement of MICSA's acknowledgment of state jurisdiction in disputes such as this.

Even if ABMSA had supplanted MICSA in favor of the state Micmac Act, the correct conclusion would be that ABMSA had simultaneously ratified the relevant provision of that act into federal law. *Cf. Mattingly v. District of Columbia*, 97 U.S. 687, 690, 24 L. Ed. 1098 (1878) (explaining that Congress can ratify earlier proceedings, notwithstanding the fact that the earlier proceedings were procedurally irregular, "if the

irregularity consists in the . . . mode or manner of doing some act . . . which [Congress] might have made immaterial by prior law").

Thus, notwithstanding the dissent's arguments, we believe that MICSA's § 1725(a) continues to govern the relationship between Maine law and the Aroostook Band. And even if it did not, we would conclude that a virtually identical provision in the state Micmac Act, Me. Rev. Stat. Ann. tit. 30, § 7203, had been ratified into federal law with similar effect. Under either scenario, the Aroostook Band is subject to the state laws at issue in this appeal.

3. *ABMSA and the Status of the Houlton Band*

A final set of arguments about ABMSA, and its interplay with MICSA, comes from the Houlton Band as amicus curiae. These arguments are also without merit.

First, amicus notes that while MICSA's § 1725(a) subjects Maine tribes to state law, that provision also contains exceptions for §§ 1724(d)(4) and 1727(e). Amicus reads those two provisions as "authoriz[ing] the State and the [Houlton] Band to separately negotiate jurisdictional and other terms." Amicus adds that because these exceptions are introduced by the language "[e]xcept as provided in," rather than the word "notwithstanding," Congress failed to express an intent to generally subject the Houlton Band to state law. The further inference we are apparently supposed to make is that ABMSA has a similar intent (or lack thereof) regarding the Aroostook Band.

This argument is misguided. Whatever the difference between the phrases "except as provided in" and "notwithstanding," it does not bear the weight amicus assigns. By using "except as provided in," Congress clearly expressed its view in MICSA that state law will apply to Maine tribes unless one of the two exceptions applies. These two statutory exceptions have nothing to do with the application of state law in this case. One, § 1727(e), pertains solely to child welfare matters. The other, § 1724(d)(4), is clearly limited to arrangements for Houlton Band land acquisition, and the tax consequences that will flow from that.

Second, amicus argues from MICSA's § 1725(e)(2), which provides:

Notwithstanding the provisions of [§ 1725(a)], the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State of Maine over lands owned by or held in trust for the benefit of the band or its members.Amicus reasons from this that Congress wanted Maine and the Houlton Band to form their own agreement regarding Maine's jurisdiction, and thus Congress did not intend MICSA to contravene the Houlton Band's sovereignty (with the inference, again, that Congress intended a similar effect for the Aroostook Band in ABMSA).

Amicus misses the mark. While Congress contemplated the state and Houlton Band negotiating over certain matters, it also clearly set the baseline from which that negotiation would proceed. Indeed, § 1725(e)(2) clearly states that any negotiated agreement would be an *exception* to § 1725(a). Since there is no pertinent

agreement here, § 1725(a) controls, and the Houlton Band's sovereignty has been abrogated (with the further implication that any inferential argument applicable to the Aroostook Band would be foreclosed).

## V. OTHER ARGUMENTS

In the previous sections, we concluded that MICSA subjects the Aroostook Band to claims of employment discrimination under state law, and that this is not altered by ABMSA. The Aroostook Band argues that even if this is so, there are two other reasons why we should uphold the magistrate judge's decision. We reject both reasons.

First, the Aroostook Band argues that its sovereign immunity protects it from the jurisdiction of the Maine courts, even if the Aroostook Band is in fact subject to substantive Maine law. But the language of § 1725(a) clearly subjects the Aroostook Band to not only the civil and criminal jurisdiction of "the State," but also the jurisdiction of its courts. Also, the Aroostook Band's argument relies on a distinction between inherent sovereignty and sovereign immunity that this court has rejected. *See Narragansett*, 449 F.3d at 24-25.

The Aroostook Band next contends that this court must engage in *Bracker* preemption analysis. *See White Mountain Apache Tribe v. Bracker*, 448 U.S. 136, 100 S. Ct. 2578, 65 L. Ed. 2d 665 (1980). When it applies, *Bracker* analysis has two parts: state law may be preempted either because of the application of federal law, or because of inherent tribal sovereignty. *See* id. at 142-43; *see also New Mexico v. Mescalero Apache Tribe*, 462 U.S. 324, 333-34, 103 S. Ct. 2378, 76 L. Ed. 2d 611 &

n.16 , 462 U.S. 324, 103 S. Ct. 2378, 76 L. Ed. 2d 611 (1983). But *Bracker* analysis does not apply in cases where a federal settlement act applies state law to a tribe. *See Narragansett*, 449 F.3d at 22-23.[28]

## VI. CONCLUSION

The parties have not challenged the magistrate judge's finding that the Aroostook Band is exempt from Title VII, and we do not disturb that conclusion. In all other respects, we reverse the magistrate judge's decision.

The magistrate judge did not rule on several of the Aroostook Band's alternative claims for relief: count 2, regarding sovereign immunity, count 4, regarding Title VII preemption, and count 5, regarding interpretations of state employment law. But the sovereign immunity claim was briefed to us as an alternative ground for affirmance, we have rejected it, and it is now foreclosed. The other two claims -- Title VII preemption of state law and the state law interpretive question based on pendent jurisdiction[29] -- are remanded.

The judgment is *reversed* and *remanded*. Costs are awarded to the defendants-appellants.

-Dissenting opinion follows-

## DISSENT BY: LIPEZ

## DISSENT

LIPEZ, *Circuit Judge*, dissenting. The majority considers at length whether the Maine Indian Claims Settlement Act ("MICSA") authorizes the State to

enforce its employment discrimination laws against the Aroostook Band of Micmacs and concludes that it does. In my view, however, MICSA no longer governs the relationship between the Band and the State. Instead, the federal Aroostook Band of Micmacs Settlement Act ("ABMSA") replaced MICSA in 1991 as the federal law governing the Band's status, including its relationship with the State of Maine.

I recognize that all relevant parties - Congress, the State and the Band - assumed that ABMSA's passage would leave the Band subject to Maine law. ABMSA, however, relied solely on the State's Micmac Settlement Act ("MSA") to establish Maine's jurisdiction over the Band.[30] That reliance makes the effectiveness of the state statute critical to the outcome of this case. I agree with the magistrate judge that, with at least one prerequisite unmet, MSA was never validly enacted, and the jurisdiction asserted by Maine and anticipated by Congress never took effect. Consequently, I conclude that the Band is not subject to the Maine employment discrimination laws at issue in this case. Respectfully, therefore, I dissent.

I.

The majority's discussion of "The Status of the Aroostook Band under ABMSA" is devoted primarily to addressing, and rejecting, potential conflicts between MICSA and ABMSA. My colleagues specifically consider whether ABMSA's provisions on federal recognition and self-government, §§ 6(a) and 7(a), conflict with, and thus exempt the Band from, the MICSA provision subjecting all Maine tribes to state law, 25 U.S.C. § 1725(a). Their discussion of potential

conflicts is, however, beside the point because § 1725(a) no longer applies to the Micmacs. I agree with the Band that, except where otherwise stated in ABMSA, that act supplants MICSA with respect to the Micmacs' status. ABMSA was enacted to replace MICSA on all matters for which the Band should have received individualized recognition in the earlier statute - as did the Passamaquoddys, the Penobscots and the Maliseets. In effect, Congress retrieved the Micmacs from the MICSA catch-all provisions that applied to "all other tribes or bands of Indians" and, in a detailed and comprehensive enactment, defined the Micmacs' new status as the fourth Maine tribe to be recognized and compensated for the loss of their aboriginal holdings.

I recognize the canon of statutory construction, cited by the majority, that two statutes capable of co-existence must both be regarded as effective, "absent a clearly expressed congressional intention to the contrary." *Morton v. Mancari*, 417 U.S. 535, 551, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974); *see also United States v. Lahey Clinic Hosp., Inc.*, 399 F.3d 1, 10 (1st Cir. 2005) ("Inconsistency between . . . two statutes . . . is not enough: 'where two seemingly inconsistent acts can reasonably stand together, a court must interpret them in a manner which gives harmonious operation and effect to both, in the absence of clear and unambiguous expression of Congressional intent to the contrary.'") (citations omitted). The issue, however, is not whether the two statutes may co-exist - I agree that they may - but what effect ABMSA had on MICSA's applicability to the Micmacs.

In my view, it is apparent that ABMSA replaces the general "all other tribes" approach of MICSA, as it may

have applied to the Band, with a specific statute premised on federal recognition of the Band. In its coverage of subjects addressed in MICSA, this separate statutory settlement with the Micmacs parallels MICSA's settlement with the other named tribes. In fact, Congress included language in ABMSA reflecting such an intent. In ABMSA's "Findings and policy" section, Congress observed that "[t]he Band was *not referred to* in [MICSA]" because its historical presence in Maine had not yet been documented, § 2(a)(2) (emphasis added), and further stated that "[i]t is now fair and just to afford the [Micmacs] the same settlement provided to the [Maliseets] . . . *to the extent they would have benefitted from inclusion in the Maine Indian Claims Settlement Act of 1980*," § 2(a)(5) (emphasis added). Congress thus enacted ABMSA because, after closer scrutiny of the Band's history, lawmakers saw the need to redress the Band's omission from MICSA as a federally recognized tribe.

Despite an expressed intent to afford the Band the same settlement as the Maliseets, it is telling that Congress did not simply amend MICSA to extend like terms to the Micmacs. Rather, Congress specified in ABMSA's provisions various entitlements for the Band, including a $ 900,000 land acquisition fund, *see* § 4(a), federal recognition, *see* § 6(a), and the right to "organize for its common welfare," *see* § 7(a). ABMSA also contains provisions that parallel MICSA's on the Band's eligibility for financial benefits and for special services from the federal government. *Compare* ABMSA §§ 6(a), (c) *with* 25 U.S.C. § 1725(i).

In addition, as the majority acknowledges, ABMSA explicitly incorporated MICSA provisions governing

the applicability of federal law, *see* § 6(b), and implementation of the Indian Child Welfare Act, *see* § 8.[31] If MICSA continued to apply to the Micmacs independently of such references in ABMSA, there would be no need for ABMSA to explicitly incorporate particular MICSA provisions. The majority offers an explanation for the overlap with respect to § 8 - observing that it clarifies the applicability of the Indian Child Welfare Act in Maine - but does not explain the need to adopt MICSA's terms for the applicability of federal law in § 6(b). In my view, the reason for both is the same: where Congress wanted MICSA's provisions to continue to apply to the Micmacs, it knew that it had to say so explicitly because ABMSA replaced MICSA with respect to the Band. Congress also took this approach with MICSA's universal extinguishment of claims of aboriginal title to Maine lands, explicitly recognizing that the Band remained bound by that portion of the earlier statute. *See* ABMSA § 2(a)(3) (noting that the Micmacs "could have asserted aboriginal title" to lands in Maine "but for the extinguishment of all such claims by the Maine Indian Claims Settlement Act of 1980").

The specificity and completeness of ABMSA are persuasive evidence that the Act was clearly intended by Congress as a comparable, but independent, statement of the benefits and limitations applicable to the Band. The majority wrongly dismisses the Band's argument that ABMSA's reference to particular MICSA provisions, and not others, is significant, *see supra* pp. 41-42 (observing that the lack of reference to MICSA's § 1725(a) - the section imposing state jurisdiction on the tribes - is "easily explained" because ABMSA "clearly contemplates that the state Micmac

Act will have effect," and the state act "contains language nearly identical to MICSA's § 1725(a)"). That, of course, is precisely my point: in fully addressing the status of the Micmacs in ABMSA, Congress intended and expected that state jurisdiction over the Band would be accomplished by means of the state Micmac Act. Section 1725(a) was not mentioned because it was no longer pertinent; as with all other facets of the Micmacs' status, Congress enacted a new, specific provision to govern the Band's relationship with the State.

The majority misses the larger context when it briefly rejects the notion that ABMSA impliedly repealed § 1725(a). As my discussion shows, the issue here is not whether MICSA or any of its particular provisions were repealed through ABMSA. They were not. Rather, as the Band has argued, ABMSA simply rendered MICSA inapplicable to the Micmacs - except where specifically incorporated.[32] Moreover, even if we viewed this case from the perspective of implied repeal, the all-embracing nature of ABMSA would meet the standard to show Congressional intent to "repeal" MICSA insofar as it applied to the Micmacs. *Cf. Posadas v. Nat'l City Bank*, 296 U.S. 497, 503, 56 S. Ct. 349, 80 L. Ed. 351 (1936) ("[I]f the later act covers the whole subject of the earlier one and is clearly intended as a substitute, it will operate similarly as a repeal of the earlier act."); *Lahey Clinic Hosp.*, 399 F.3d at 10 (noting that implied repeal of a federal statute may be shown if, "by clear and manifest intent," a later act "covers the whole subject matter area and was meant as a substitute") (citing *Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 468, 102 S. Ct. 1883, 72 L. Ed. 2d 262 (1982)); *Granite State Chapter, Assoc. of Civilian*

*Technicians v. Fed. Labor Relations Auth.*, 173 F.3d 25, 27 (1st Cir. 1999) ("If one Congress clearly and manifestly makes known its intent to supplant an existing law, a court can find repeal by implication."). That the progression from MICSA to ABMSA is from a general statute to a specific one lends additional support to the view that AMBSA effectively "repealed" MICSA with respect to the Band. *Cf. Montana v. Blackfeet Tribe of Indians*, 471 U.S. 759, 766, 105 S. Ct. 2399, 85 L. Ed. 2d 753 (1985) (noting the "strong presumption against repeals by implication, . . . especially an implied repeal of a specific statute by a general one") (citations omitted).

Congress's intention to replace MICSA with ABMSA for the Micmacs is evident in ABMSA's approach to the issue of state jurisdiction over the Band. ABMSA neither invokes MICSA nor in its own terms subjects the Band to state law. Instead, it states as an express purpose the ratification of "the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs." § 2(b)(4). By explicitly deferring to MSA on the issue of state jurisdiction without any reference to MICSA, ABMSA states, in effect, that MICSA is no longer the governing law on the Micmacs' relationship with the State.[33]

The view of the majority that MICSA could be reactivated as a default, imposing state law on the Micmacs in the face of any statutory gap that may have occurred because of the failed enactment of MSA, might be more persuasive if MICSA and MSA contained identical jurisdictional provisions. In such circumstances, one could more plausibly argue that ABMSA was intended to reaffirm an ongoing

relationship, first defined by MICSA. MICSA, however, included two separate provisions establishing the State's authority over its resident tribes. *See* 25 U.S.C. § 1725(a), (d)(1). MSA did not include the second of these - the "sue and be sued" provision that typically is used to signify a waiver of immunity from suit. *See, e.g., Gomez-Perez v. Potter*, 476 F.3d 54, 57 (1st Cir. 2007). Whether or not that omission is significant on the question of sovereign immunity, it is a further indication that ABMSA was a distinct and independent enactment that replaced MICSA with respect to the Micmacs. To resurrect statutory provisions from MICSA when Congress in ABMSA effected (through attempted ratification of MSA) a different governing framework for the Band's relationship with the State is unsupportable - and inconsistent with "a clearly expressed congressional intention to the contrary," *Morton*, 417 U.S. at 551.

My view that ABMSA replaced MICSA as the federal law governing the Band's status and defining the Micmac-Maine relationship - and that MICSA therefore may not be invoked as a default - is reinforced by comments from every member of Maine's Congressional delegation at the time of ABMSA's passage. In urging a favorable vote on the statute, then-Senators Cohen and Mitchell and then-Representatives Andrews and Snowe all emphasized the need for the new legislation because of the Micmacs' "omission from the 1980 Maine Indian Claims Settlement Act." 137 Cong. Rec. H9,652, 9,655 (1991); *see also* 137 Cong. Rec. S13,360, 13,362 (1991). Among other comments, Senator Mitchell observed:

*The Micmacs' exclusion* from the 1980 Maine Indian Claims Settlement Act *left them in a unique situation*, where they have no State Indian assistance and are ineligible for Federal assistance. The bill the Senate is considering today will establish the historical presence of the Micmacs in Maine and provide Federal recognition to the band.137 Cong. Rec. at S13,362 (emphasis added).

Senator Cohen assured his colleagues that "[t]he bill does not amend the 1980 act, and we do not intend that any of the issues covered in that landmark legislation will be reopened or reconsidered." 137 Cong. Rec. at S13,362. In other words, Congress began with a clean slate in giving the Band - singularly excluded from MICSA - due recognition for its historical presence in Maine. To the extent that Congress wanted to draw on MICSA in drafting ABMSA, it cited the specific provisions of MICSA that it wished to incorporate into ABMSA.

ABMSA's conflicts provision, § 11, reflects this approach. The provision states: "In the event of a conflict of interpretation between the provisions of the Maine Implementing Act, the Micmac Settlement Act, or the Maine Indian Claims Settlement Act of 1980 . . . and this Act, the provisions of this Act shall govern." MICSA remained in effect, and Congress undoubtedly recognized that the general language in MICSA and the more specific language in ABMSA covered some of the same subject matter. It thus sought to ensure that any seeming conflicts between the two would be resolved by deferring to ABMSA's provisions - reinforcing ABMSA's preemptive effect on the matters it covered.[34]

In sum, every indicator points to a congressional intent to supplant MICSA for the Micmacs in all respects in which that earlier statute was not explicitly extended by ABMSA's terms. Thus, I can only conclude that, after passage of ABMSA, MICSA no longer controlled Maine's jurisdiction over the Aroostook Band of Micmacs.

II.

My conclusion that ABMSA, rather than MICSA, governs Maine's authority to impose its employment discrimination laws on the Band requires me to evaluate the Maine Micmac Act. ABMSA relied wholly on the state act to "define[] the relationship between the State of Maine and the Aroostook Band of Micmacs," § 2(b)(4), and I therefore must confront the Band's challenge to the validity of MSA. In a thoughtful and thorough discussion, the magistrate judge considered whether that statute may be deemed valid even though several statutory prerequisites to its effectiveness - including a requirement that it be certified by the Band within sixty days of the 1989 Legislature's adjournment - were not met.[35] *See Aroostook Band of Micmacs, 403 F. Supp. 2d at 118-22.* I agree with her assessment that it may not.[36]

The required certification cannot be cast aside as a mere technicality. Given the complex relationship between Maine and its tribes, it would be both injudicious and disrespectful to ignore an express requirement of consent contained in a settlement act.[37] Indeed, ABMSA and MSA carry the consent requirement through to future amendments regarding jurisdiction, *see* 30 Me. Rev. Stat. Ann. tit. 30, § 7201

(Historical and Statutory Note); ABMSA § 6(d). Therefore, on this jurisdictional issue in particular, securing the Band's formal agreement was deemed necessary.

As the magistrate judge pointed out, strict adherence to the consent procedure is consistent with a 1985 legal opinion from Maine's Attorney General concerning a similar certification requirement in the "Act Relating to the Time of Penobscot Nation Trust Land Acquisition." That act required the Penobscot Nation to submit written certification of its agreement with the act's provisions within sixty days of the legislature's adjournment. The tribe's certification was received two days late, and the Attorney General concluded that the only remedy was to reenact the legislation. He observed:

While this is unfortunate, I feel it is especially necessary to be strict in interpreting these provisions in that it deals with the question of land acquisition. Indeed, any other conclusion . . . could render a land transaction subject to legal challenge by third parties.Although MSA does not focus on the question of land acquisition, it is of comparable significance because the statute would diminish the Band's sovereign rights. *Cf., e.g., Penobscot Nation v. Fellencer*, 164 F.3d 706, 709 (1st Cir. 1999) (noting that courts are obliged "to construe 'acts diminishing the sovereign rights of Indian tribes . . . strictly'") (quoting *Rhode Island v. Narragansett Indian Tribe*, 19 F.3d 685, 702 (1st Cir. 1994)). Moreover, the Legislature added the certification requirement to MSA in the face of the Attorney General's previously issued opinion, with the presumptive understanding that a failure to meet it

could prevent the statute from taking effect. The formalities of legislative enactments often have substantive importance. In the context of Indian sovereignty, it would be particularly inappropriate to ignore an express statutory term protective of that sovereignty.

Indeed, while MSA's efficacy is technically an issue governed by Maine law, the limitation it purportedly imposes on the Band's sovereignty implicates federal concerns as well. States may not assert jurisdiction over tribes without congressional approval, *see Three Affiliated Tribes of Fort Berthold Reserv. v. Wold Eng'g*, 476 U.S. 877, 891, 106 S. Ct. 2305, 90 L. Ed. 2d 881 (1986) ("[I]n the absence of federal authorization, tribal immunity, like all aspects of tribal sovereignty, is privileged from diminution by the States."); *Fellencer*, 164 F.3d at 709 ("[O]nly Congress can abrogate or limit an Indian tribe's sovereignty."), and courts must remain sensitive to the federal interest even when sovereignty issues arise from state law. Noting that this is a "unique case and there is no controlling authority either way," appellants urge the court to find implied certification based on the Band's expressed support of MSA at the time of its enactment. On matters of Indian sovereignty, however, the magistrate judge is certainly correct that a court may not "finesse what is clearly the absence of a state legislative imposed precondition to the statute's valid enactment." 403 F. Supp. 2d at 121.

Moreover, as with the issue of land acquisition, compliance with the certification requirement could have reduced the risk of time-consuming and expensive future conflicts. If the Band's governing body had discussed and voted on the certification, tribal officials

would have had the opportunity to crystallize their expectations and clarify matters of concern, and the Band's formal commitment to the agreement would have protected the State from later claims that the Band objected to certain of its terms. Failure to obtain the Band's consent was not, as appellants argue, simply an "irregularity in the final execution of the agreement." To find implied consent would be to override the very purpose of a certification provision.

I also join the magistrate judge in rejecting the notion that Congress's expression of purpose to ratify MSA effectively validated the statute - or served to incorporate its substantive provisions into federal law. Unlike MICSA, which affirmatively states that the tribes shall be "subject to the civil and criminal jurisdiction of the State," 25 U.S.C. § 1725(a), or, in the case of the Passamaquoddy Tribe and Penobscot Nation, "subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act," *id.* § 25 U.S.C. 1725(b)(1), ABMSA does not directly refer to the State's jurisdiction. Instead, it defers to state law to "define[] the relationship between the State of Maine and the Aroostook Band of Micmacs."[38] The silence in the federal statute, in light of Congress's otherwise comprehensive treatment of the Band's status, reflects a lack of affirmative intent on the issue. From all that appears, Congress was content in 1991 to leave the relationship between the Band and the State to Maine law. While Congress unquestionably anticipated a limitation on the Band's sovereignty through MSA, it would be reading beyond the text to construe the purpose provision to mandate such a limitation. I see no basis for invigorating a state statutory enactment that

fails as a matter of state law, and which Congress has not replicated as a discrete statutory provision within ABMSA.

It has now been nearly ten years since the certification problem surfaced, casting doubt on the validity of MSA and its assertion of state jurisdiction over the Band. In the well stated words of the magistrate judge: "There is no doubt that Congress did (and still does) have the power to enact federal legislation which, despite the lack of an effective state law, included the terms of that legislation in the federal act[,] making those terms federal law." 403 F. Supp. 2d at 122. Congress has so far not chosen to act, and the courts are not at liberty to fill the gap.[39]

III.

I recognize that my conclusions about ABMSA and MSA lead to an anomalous result - the Micmacs are the sole Maine tribe *not* subject to some level of state jurisdiction. But courts may not ignore established principles of statutory construction or the canons of Indian law to avoid uncomfortable outcomes. The failure of MSA to take effect means that the Micmacs were left with the sovereign rights they otherwise would hold as a recognized Indian tribe under ABMSA. *See Aroostook Band of Micmacs v. Ryan*, 404 F.3d 48, 62 (1st Cir. 2005) ("A tribe retains those aspects of sovereignty that have not been 'withdrawn by treaty or statute, or by implication as a necessary result of [the tribe's] dependent status.'") (quoting *United States v. Wheeler*, 435 U.S. 313, 323, 98 S. Ct. 1079, 55 L. Ed. 2d 303 (1978)) (alteration in original), *overruled on other grounds by Narragansett Indian Tribe v. Rhode*

*Island*, 449 F.3d 16 (1st Cir. 2006) (en banc)[40]; *Fellencer*, 164 F.3d at 709. Although that outcome is not what Congress anticipated,[41] it is nonetheless the inevitable result of the choice Congress made to explicitly rely on the state Micmac Act to frame the Maine-Micmac relationship.[42]

Our prior case law establishes that the sovereign rights retained by the Band foreclose application of the state's employment discrimination laws to the Micmacs. *Cf. Fellencer*, 164 F.3d at 711-13 (rejecting employment discrimination claim against the Penobscot Nation, relying, *inter alia*, on "'the longstanding federal policy of providing a unique legal status to the Indians in matters of tribal employment'") (quoting *Morton v. Mancari*, 417 U.S. 535, 548, 94 S. Ct. 2474, 41 L. Ed. 2d 290 (1974)). I would therefore affirm the judgment of the magistrate judge.

Footnotes

[1]There are only small exceptions pertaining to child welfare matters, *see* 25 U.S.C. § 1727(e), and land acquisition, *see id.* § 1724(d)(4), and the exceptions are not pertinent here, as we discuss later.

[2]During committee discussions in the Maine legislature, members of the Aroostook Band spoke in favor of passage of the state Micmac Act. After committee deliberations, and after discussions between the Aroostook Band and the state had ended, the Maine legislature amended the pending Micmac bill to add an effectiveness provision. That provision stated that the Micmac Act would only be effective if certain contingencies were met; one of these contingencies was a requirement that the Aroostook Band formally certify

its agreement with the act within 60 days of the legislature's adjournment. *See* 1989 Me. Laws 230, 232. The Aroostook Band was apparently unaware that this requirement had been added, and it never submitted the certification. The other contingencies for effectiveness, which required that ABMSA be enacted with certain provisions, also may not have been fulfilled.

[3]Gardiner's and Condon's claims are now the subject of related litigation in the Maine state courts. That litigation has apparently been stayed pending the outcome of this suit. *See Aroostook II*, 404 F.3d at 52.

[4]The complaint treated tribal sovereign immunity as a concept distinct from inherent sovereignty. As we discuss later in the opinion, our case law has now rejected this distinction.

[5]In light of her resolution, the magistrate judge did not reach the merits of most of the Aroostook Band's remaining claims. She dismissed the Band's claims based on tribal sovereign immunity, Title VII preemption, and interpretation of the MHRA and MWPA, as any relief on those claims would have been identical to the relief already granted. *Aroostook III*, 403 F. Supp. 2d at 133. The magistrate judge did enter judgment for the Aroostook Band on its third claim, which contended that the Band was exempt from Title VII. *Id.* at 130-31, 133. The merits of that claim were not contested, and are not a subject of this appeal.

[6]Maine does acknowledge the possibility that MICSA and ABMSA did not fully abrogate the Aroostook Band's sovereignty as to all matters -- it contends, however, that the issues in this case cannot fall within

the limited exception. The State's acknowledgment is only that ABMSA § 7(a) may give the Aroostook Band independence over aspects of its own governmental and electoral structures. *Cf. Narragansett*, 449 F.3d at 26 (finding congressional abrogation of a tribe's sovereignty, but recognizing the possibility that the tribe still retained control over a "core group of sovereign functions").

[7]The State also relies on a separate MICSA provision, *see* 25 U.S.C. § 1725(h), to argue that the federal common law doctrine of tribal sovereignty no longer has force anywhere within the State of Maine. We do not reach this argument.

[8]The Aroostook Band argues that its employment of defendants Gardiner, Condon, and Ayoob was an "internal tribal matter." For purposes of this decision, we assume that to be true for the sake of argument.

In *Penobscot Nation* v. *Fellencer*, this court determined that a tribe's employment of a community health nurse, who tended to the personal medical needs of tribal members, was an "internal tribal matter" within the meaning of the Settlement Acts. *See* 164 F.3d at 707. Because it has not been contested, we accept arguendo the extension of *Fellencer* to this case. We do note that unlike in *Fellencer*, *see id.* at 710, Maine has here claimed an interest in the enforcement of its employment laws.

[9]Although this portion of *Narragansett* was referring to "sovereign immunity" rather than "inherent sovereignty," elsewhere in that en banc opinion we rejected the idea that there was a meaningful distinction between the two, and we explicitly

overruled *Aroostook II* to the extent it held otherwise. *See Narragansett*, 449 F.3d at 24-25.

[10]Indeed, it appears that it was the Aroostook Band as a legal entity that employed defendants Gardiner, Condon, and Ayoob. Both sides admitted in the district court that "the Band" employed the three individual defendants.

Additionally, as defendants Gardiner and Condon point out, the plaintiff in this lawsuit is the "Aroostook Band of Micmacs," which the complaint tells us is governed by the "Aroostook Band of Micmacs Tribal Council." All relief is requested on behalf of "the Band." If only the Band as "polity" is the plaintiff, and it is requesting relief only on behalf of itself, one wonders whether the plaintiff even has standing to advance claims on behalf of the Band as "government."

[11]While we are not obligated to consider points raised only by an amicus, *see North & S. Rivers Watershed Ass'n v. Scituate*, 949 F.2d 552, 556 n.8 (1st Cir. 1991), we nonetheless consider this and other points, in part because we have the benefit of the state's responses.

[12]*Fellencer* is the only cited case from this jurisdiction and it hardly helps the Aroostook Band. That decision, which involved a former employee of the Penobscot Nation, merely interprets the "internal tribal matters" exception explicitly contained in the state and federal settlement acts. *Fellencer*, 164 F.3d at 707. *Fellencer* concluded that the exception applied on its facts, insulating the contested employment decision from Maine law. *Id.* at 713. No one doubts that the "internal tribal matters" exception applies to the Penobscots; the

question is whether it also applies to the Aroostook Band.

[13]The Aroostook Band does cite one case that is more on point. *See Middletown Rancheria of Pomo Indians v. Workers' Comp. Appeals Bd.*, 60 Cal. App. 4th 1340, 71 Cal.Rptr.2d 105 (Cal. Ct. App. 1998). But *Middletown* merely interprets the same statute, Public Law 280, which the Supreme Court dealt with in *Bryan*. *See id.* at 112 (holding that *Bryan*'s interpretation controlled the outcome). We distinguished *Bryan* and Public Law 280 above, noting in particular the fact that Public Law 280 does not specifically apply state law to the tribes themselves.

[14]Maine's highest court has expressed a similar understanding. *See Penobscot Nation v. Stilphen*, 461 A.2d 478, 488-89 (Me. 1983).

[15]The Houlton Band, as amicus curiae, attempts to salvage the interpretation offered by the Aroostook Band. It contends that the Passamaquoddy Tribe and the Penobscot Nation received the less generous "internal tribal matters" exception, while all other Maine tribes retained the full extent of their inherent sovereignty. This radical interpretation finds little textual support, and is drastically at odds with the legislative history.

[16]The Aroostook Band does not argue that, in 1980, the drafters of either settlement act intended to give the Aroostook Band more favorable terms than what the Houlton Band was given.

[17] ABMSA § 6(a) states:

Federal recognition is hereby extended to the Aroostook Band of Micmacs. The Band shall be eligible

to receive all of the financial benefits which the United States provides to Indians and Indian tribes to the same extent, and subject to the same eligibility criteria, generally applicable to other federally recognized Indians and Indian tribes.

[18]Nor is Maine the only state where Congress has made federal recognition consistent with limits on sovereignty. The Narragansett Indian Tribe is a federally recognized tribe, and it too has had aspects of its sovereignty abrogated by a similar settlement. *See Narragansett*, 449 F.3d at 19, 25-27.

[19]Citing MICSA's Senate Report, amicus argues that "recognition" in MICSA actually does have the same meaning as what the Aroostook Band attributes to ABMSA § 6(a). That Senate report comments on the state Settlement Act's stated purpose to "wholly subject" the Houlton Band of Maliseet Indians and its lands to "the laws of the State," Me. Rev. Stat. Ann. tit. 30, § 6202. *See* S. Rep. No. 96-957, at 35 (1980). The report states that § 6202 differs from MICSA in that the latter "will extend Federal recognition to the Maliseets . . .[, and] will provide that Maliseet land must also be taken in trust . . . which will entail exemptions from some state laws." *Id.*

This legislative history does little to advance amicus's position. First, the report is silent as to any conflict between MICSA's § 1725(a) and federal recognition, and it is § 1725(a) that subjects tribes like the Houlton Band and Aroostook Band to Maine law. Second, even if federal recognition is inconsistent with "wholly" subjecting the Houlton Band to state law, it is another question entirely how far any exemption goes. Under Maine's interpretation of MICSA, the Houlton Band

may still retain sovereignty over certain key decisions regarding the structure of its government and its electoral process.

[20]In passing ABMSA, Congress plainly did not intend to give the Aroostook Band greater benefits than it had given the Houlton Band in MICSA. As one of its stated purposes, ABMSA declares that "[i]t is now fair and just to afford the Aroostook Band of Micmacs the same settlement provided to the Houlton Band of Maliseet Indians for the settlement of that Band's claims, to the extent they would have benefitted from inclusion in [MICSA]." ABMSA § 2(a)(5); *see also id.* § 2(a)(4) ("The Aroostook Band . . . is similar to the Houlton Band . . . and would have received similar treatment under [MICSA] if the [historical] information available today had been available . . . [in 1980]"). ABMSA's Senate committee report reinforces that view. *See* S. Rep. No. 102-136, at 1 (1991) ("The bill will extend to the Aroostook Band . . . the same compensation, rights and benefits as were provided to the Houlton Band . . . in [MICSA]"). Indeed, ABMSA authorizes a $ 900,000 appropriation for Aroostook land acquisition, *see* ABMSA §§ 4(a), 10, the same amount that MICSA authorized for Houlton land acquisition. And despite the Aroostook Band's suggestions otherwise, nothing in *Aroostook II* contradicts our conclusion that similar treatment was envisioned.

[21]The Aroostook Band points us to the IRS's determination that the tribe exercises "governmental functions" for the purposes of certain provisions in the Internal Revenue Code. *See* Rev. Proc. 2002-64, 2002-2 C.B. 717. This is wholly beside the point, and offers no assistance in our interpretation of ABMSA.

[22]Amicus points to other bits of legislative history, but they do not provide the needed support for the Aroostook Band's arguments. Amicus cites Secretary Andrus's testimony that his proposal would "clarify the jurisdictional relationships and . . . *provide for viable tribal governments in the future.*" *MICSA Senate Hearings* at 38 (statement of Secretary Andrus) (emphasis added). Yet context shows that this statement was made in regard to the confusion surrounding the municipal status of the Passamaquoddy and the Penobscots. It does not appear that the statement was intended to apply to other tribes. In any event, the reference to "viability" seems to refer merely to ensuring the tribe has a clear, written, source of governing authority. There is no indication it has a broader meaning.

[23]This omission is glaring because the Aroostook Band asserts that § 1726(a) took language with "well-established meaning" in the IRA. In fact, a leading casebook seems to suggest that the meaning of § 16 is very much in doubt. *See* Getches et al., *Cases and Materials on Federal Indian Law* 196 (5th ed. 2005) (noting the paucity of litigation about the IRA's terms); *see also id.* (wondering whether § 16 actually grants tribes any substantive powers).

[24]It is a significant overstatement to claim that § 8(a)'s reference to MICSA would be "meaningless surplusage" under Maine's reading of the relevant statutes. The first part of § 8(a) includes the Aroostook Band in the Indian Child Welfare Act, a federal statute. Without clarification, this part of § 8(a) would raise a real question whether the Indian Child Welfare Act continues to have force in Maine. *See* 25 U.S.C. § 1725(h) (making federal laws inapplicable in Maine if

they give Indians special benefits and they "affect[] or preempt[]" Maine's jurisdiction). Thus the second half of § 8(a) plainly adds a needed proviso: "nothing in this section shall alter or affect the jurisdiction of the State of Maine over child welfare matters as provided by [MICSA]."

[25]*Compare* Me. Rev. Stat. Ann. tit 30, § 7203 ("[T]he Aroostook Band of Micmacs and all members . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person . . . ."), *with* 25 U.S.C. § 1725(a) ("[All Maine tribes and Indians], other than the Passamaquoddy Tribe, the Penobscot Nation, and their members . . . shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person . . . .").

[26]The Aroostook Band's implied repeal argument was made only to advance its claim that certain provisions of ABMSA provide affirmative grants of sovereignty. *See* Principal Br. for the Appellee at 54-56. Indeed, the portion of the brief cited by the dissent was taken from a section titled "ABMSA §§ 6(a) and 7(a) Conflict Sharply with MICSA." *See id.* at 54. Although we disagree with the Aroostook Band's interpretation of ABMSA §§ 6(a) and 7(a), we acknowledge its attempt to advance a view of the statutory scheme that it simultaneously claims was intended by Congress. Amicus also does not present the dissent's interpretation.

[27]Indeed, the dissent's position essentially conceives of ABMSA as containing an (unwritten) clause that repeals part of § 1725(a) in favor of the state Micmac Act. *See post*, at 59 ("By explicitly deferring to [the state Micmac Act] . . . ABMSA states, in effect, that MICSA is no longer the governing law on the Micmacs' relationship with the State."). But can such a "clause" continue to be valid if it were later determined that the state Micmac Act never became law?

That scenario resembles situations in which a new statute arguably repeals an earlier statute, but the new statute is ultimately found unconstitutional. As the Sixth Circuit has recognized, it is well established that an invalid statute "does not repeal a prior statute on the subject when a contrary construction would create a void in the law which the legislative body did not intend. The prior statute is 'revived' to avoid a chaotic hiatus in the law." *White Motor Corp. v. Citibank, N.A.*, 704 F.2d 254, 261 (6th Cir. 1983). Although our situation is not perfectly analogous, similar principles counsel avoiding an interpretation that would lead to an unintended "void in the law."

[28]*Narragansett*'s holding regarding *Bracker* is properly applied to this fact pattern. Settlement act cases like this one involve a federal statute that clearly subjects a tribe to state law by abrogating that tribe's inherent sovereignty. It would be inconsistent to nevertheless conclude, under *Bracker*, either that federal law wishes a different result than a statute's plain meaning, or that a tribe's sovereignty continues in force despite abrogation. Saying that *Bracker* is inapplicable in a case like this is merely a shorthand way of saying that a federal statute has already balanced the competing factors.

[29]The magistrate judge did not decide whether to exercise pendent jurisdiction over count 5, *see Aroostook III*, 403 F. Supp. 2d at 132, and we express no opinion on that issue.

[30]ABMSA § 2(b) provides, in relevant part: "It is the purpose of this Act to - (4) ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs."

[31]Section 6(b), which is labeled "Application of Federal law," states: "For the purposes of application of Federal law, the Band and its lands shall have the same status as other tribes and their lands accorded Federal recognition under the terms of [MICSA]." Section 8, which is labeled "Implementation of the Indian Child Welfare Act," provides:

For the purposes of this section, the Band is an 'Indian tribe' within the meaning of section 4(8) of the Indian Child Welfare Act of 1978 (25 U.S.C. 1903(8)), except that nothing in this section shall alter or affect the jurisdiction of the State of Maine over child welfare matters as provided by [MICSA].

[32]The majority asserts that my view that AMBSA wholly supplants MICSA was not argued by the Band. That is not so. In its brief, the Band argued that "[u]nder well-settled rules of construction, MICSA provisions may apply to the Band only as provided in ABMSA." Br. at 55. The Band then goes on to discuss the two incorporated MICSA provisions noted by the majority:

For example, Congress enumerated in ABMSA § 8(a) that the MICSA Child Welfare provisions apply to the

Micmac. ABMSA § 6(b) provides that federal law will apply to the Band as it does to other Maine tribes in MICSA. If Congress intended that all or any other parts of MICSA would apply to the Band, then it would not have specified those it did and not the others. It is a "fundamental principle of statutory construction that the specific trumps the general." . . . Clearly, all of MICSA cannot apply to the Band without rendering the specific inclusions meaningless surplusage.*Id.* at 55-56. This position was also articulated by the Band at oral argument. In explaining the Micmacs' position in response to questions from the panel, counsel for the Band stated:

The 1980 law except where expressly . . . noted by Congress cannot apply to deny the Band its right to self-government. Congress created a wholly separate statute for the Micmac. . . . The 1991 Act, and only the 1991 Act, except where Congress noted . . . the 1980 Act would apply . . .At that point, a panel member asked: "So, the '91 Act basically eliminates the 1980 Act except where it expressly repeats?" Counsel replied: "Correct, your honor, that is our argument."

[33]The MSA jurisdiction provision states, in relevant part: "[T]he Aroostook Band of Micmacs and all members . . . shall be subject to the laws of the State and to the civil and criminal jurisdiction of the courts of the State to the same extent as any other person . . . ." Me. Rev. Stat. Ann. tit. 30, § 7203.

[34]The majority states that "[t]here is no reason to believe that Congress intended to repeal § 1725(a) *insofar as it provided a default rule* in the event that the state Micmac Act were ineffective for some reason." *See supra* p. 45 (emphasis in original). The majority

thus speculates that Congress would have invoked MICSA's jurisdictional provision as a default if it had anticipated the ineffectiveness of the state law. That speculation is improper for at least two reasons. First, as noted *infra*, it is not inevitable that Congress would have legislated a specific relationship for Maine and the Micmacs if the State itself failed to do so. Congress did not explicitly incorporate in ABMSA the substance of MSA, and it may have made a deliberate choice to allow the State to define its own jurisdictional relationship with the Band. Moreover, even if there were a basis for a presumed congressional intent to impose state jurisdiction on the Band comparable to that found in MICSA, that is no justification for rewriting ABMSA. Judgments about congressional intent must have some basis in the language of the relevant statute, even if that language is ambiguous. The majority would incorporate by judicial fiat a default provision that would read something like this: "If the Maine Settlement Act fails to take effect, the Micmacs shall be subject to the jurisdictional terms of MICSA § 1725(a)." There is not a hint of such language in ABMSA.

Elsewhere, my colleagues note that, even if Congress through ABMSA had substituted MSA for MICSA with respect to state jurisdiction over the Band, "the correct conclusion would be that ABMSA had simultaneously ratified the relevant provision of the act into federal law." This assertion reflects the same flawed judgment about Congress's intent. The statute that Congress passed does not by its own terms impose state jurisdiction on the Band. Consequently, ABMSA's purpose to ratify MSA may reflect only an intent to endorse whatever jurisdictional relationship Maine enacted into law, and not an intent to adopt a particular

Maine-Micmac relationship as a matter of federal law. Congress *could have* adopted the substance of MSA's jurisdictional provision by incorporating it into ABMSA (as MICSA incorporated the jurisdictional provisions of the Maine Implementing Act), but Congress did not do so.

[35]In the official codification, a note is appended to each section of MSA stating that the provision was added to the code "pending receipt of certification of agreement by Council of Aroostook Band of Micmacs." The notes following each subsection state that the act will become effective only if: (1) the United States enacts ratifying legislation that approves the act without modification; (2) the United States consents to amendments that would be made with the consent of the Aroostook Band of Micmacs; and (3) within sixty days of the Legislature's adjournment, the Secretary of State receives written certification from the tribal council that the Band has agreed to the act. It is undisputed that no certification was received by the Secretary of State.

[36]The majority opinion notes that whether the state Micmac Act became effective is a "difficult and complex issue of state law," and my colleagues are reluctant to decide it without guidance from the Maine Supreme Judicial Court. As I shall explain, the issue is neither complicated nor just a matter of state law.

[37]As noted by the majority, the certification provision and the other contingencies for effectiveness were added to the pending Micmac bill late in the legislative process. The Band did not learn of the certification requirement until 1997.

[38]As noted earlier, § 2(b) provided, in relevant part, that "It is the purpose of this Act to - (4) ratify the Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs."

[39]I fully agree with the magistrate judge that the lack of a severability provision in ABMSA does not mean that the entire statute must be held invalid based on MSA's ineffectiveness, which frustrated only one of ABMSA's purposes. Like her,

I am uncomfortable with the notion of reading an entire Congressional enactment out of existence, not because it is unconstitutional, but because one of its stated purposes has apparently failed. Congress can easily remedy that failure by adopting the terms of the [MSA] itself, if it chooses to do so.403 F. Supp. 2d at 123.

[40]*Narragansett* rejected the distinction drawn in *Aroostook Band of Micmacs* between tribal sovereignty and tribal sovereign immunity. *See* 449 F.3d at 24-25. [41]

With quotations from two cases, the majority suggests that my statutory interpretation is indefensible because it would produce "absurd results" or "'a chaotic hiatus in the law.'" I reject those characterizations. The restoration of Micmac sovereignty beyond what Congress had anticipated could hardly be called "absurd" and surely would not create "chaos."[42]

I am not alone in reaching this conclusion. The same view was expressed in a memorandum prepared by Philip N. Hogen, an Associate Solicitor for the Department of the Interior, in connection with Maine's application to administer the Maine Pollutant

Discharge Elimination System within Indian country. Hogen's five-page memorandum was submitted to the Office of General Counsel of the U.S. Environmental Protection Agency along with a 31-page memorandum prepared by counsel for the Micmacs (who is also counsel for the Micmacs in this case) in consultation with attorneys from the Department of the Interior and the Department of Justice. Hogen noted that "[t]he Micmacs' detailed legal memorandum incorporates comments from the two Departments and we concur with its conclusions." His memo stated:

The Department, as the primary federal agency responsible for interpreting the Maine Indian settlement acts, has analyzed the legal status of the Aroostook Band of Micmac Indians (Micmacs) and we conclude that under the Aroostook Band of Micmac Settlement Act (ABMSA), the Micmacs have retained their inherent tribal sovereignty.The substance of the memo's analysis is reflected in three section headings: (1) "The 1989 State and 1991 Federal Micmac Settlement Acts Replaced the Earlier Settlement Acts to the Extent the Earlier Acts Applied to the Micmacs," (2) "The [MSA] does not Subject the Micmacs to State Law because the [MSA] Never Became Effective," and (3) "Congress Intended the [MSA] and ABMSA to Embody the Settlements with the Micmacs, thereby Repealing the Provisions of the [Maine Implementing Act] and MICSA Previously Applicable to the Micmacs." In the last of those sections, the memo states: "To the extent Congress intended the earlier settlement acts to continue to apply to the Micmacs, Congress specified those sections in the ABMSA."

**Constitutional, Statutory and Rule Provisions Implicated by This Petition.**

**United States Constitution, Article VI, Paragraph 2:**

This Constitution, and the laws of the United States which shall be made in pursuance thereof...shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

**United States Constitution, Article I, § 8:**

The Congress shall have Power...

...

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes....

**United States Constitution, Amendment V:**

No person shall...be deprived of life, liberty, or property, without due process of law....

**25 U.S.C. § 1721(b)(4) (The Maine Indian Claims Settlement Act):**

**(b) Purposes**

It is the purpose of this subchapter—

....

(4) to confirm that all other Indians [besides the Passamaquoddy Tribe and the Penobscot Nation] Indian nations and tribes and bands of Indians now or hereafter existing or recognized

in the State of Maine are and shall be subject to all laws of the State of Maine, as provided herein.

**25 U.S.C. § 1724(d)(4):**

> The Secretary [of the Interior] is authorized to...participate in negotiations between the State of Maine and the Houlton Band of the Maliseet Indians for the purpose of assisting in securing agreement as to the land or natural resources to be acquired by the United States to be held in trust for the benefit of the Houlton Band....

**25 U.S.C. § 1725(a); (b)(1); (d)(1); (e)(2); (f); (g) and (i):**

**(a) Civil and criminal jurisdiction of the State and the courts of the State; laws of the State**

> Except as provided in section 1727(e) and 1724(d)(4) of this title, all Indians, Indian nations, or tribes or bands of Indians in the State of Maine, other than the Passamaquoddy Tribe, the Penobscot Nation, and their members, and any lands or natural resources owned by such Indian, Indian nation, tribe or band of Indians and any lands or natural resources held in trust by the United States, or by any other person or entity, for any such Indian, Indian nation, tribe, or band of Indians shall be subject to the civil and criminal jurisdiction of the State, the laws of the State, and the civil and criminal jurisdiction of the courts of the State, to the same extent as any other person or land therein.
>
> ....

**(b) Jurisdiction of State of Maine and utilization of local share of funds pursuant to the Maine Implementing Act; Federal laws or regulations governing services or benefits unaffected unless expressly so provided; report to Congress of comparative Federal and State funding for Maine and other States.**

(1) The Passamaquoddy Tribe, the Penobscot Nation, and their members, and the land and natural resources owned by, or held in trust for the benefit of the tribe, nation, or their members, shall be subject to the jurisdiction of the State of Maine to the extent and in the manner provided in the Maine Implementing Act [30 MRSA §§ 6201-6214] and that Act is hereby approved, ratified and confirmed.

....

**(d) Capacity to sue and be sued in the State of Maine and Federal Courts; section 1362 of Title 28 applicable to civil actions; immunity from suits provided in Maine Implementing Act; assignment of quarterly income payments from settlement fund to judgment creditors for satisfaction of judgments.**

(1) The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians, and all members thereof, and all other Indians, Indian nations, or tribes or bands of Indians in the State of Maine may sue and be sued in the courts of the State of Maine and the United States to the same extent as any other entity or person residing in the State of Maine may sue and be sued in those courts; section 1362

of Title 28 shall be applicable to civil actions brought by the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians: *Provided, however*, That the Passamaquoddy Tribe, the Penobscot Nation, and their officers and employees shall be immune from suit to the extent provided in the Maine Implementing Act.

**(e) Federal consent for amendment of Maine Implementing Act; nature and scope of amendments; agreement respecting State jurisdiction over Houlton Band lands.**

....

(2) ...the State of Maine and the Houlton Band of Maliseet Indians are authorized to execute agreements regarding the jurisdiction of the State Maine over lands owned by or held in trust for the benefit of the band or its members.

**(f) Indian jurisdiction separate and distinct from State civil criminal jurisdiction.**

The Passamaquoddy Tribe and the Penobscot Nation are hereby authorized to exercise jurisdiction, separate and distinct from the civil and criminal jurisdiction of the State of Maine, to the extent authorized by the Maine Implementing Act, and any subsequent amendments thereto.

**(g) Full faith and credit.**

The Passamaquoddy Tribe, The Penobscot Nation and the State of Maine shall give full faith

and credit to the judicial proceedings of each other.

**(i) Eligibility for Federal special programs and services regardless of reservation status.**

As federally recognized Indian tribes, the Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians shall be eligible to receive all of the financial benefits which the United States provides to Indians, Indian nations, or tribes or bands of Indians to the same extent and subject to the same eligibility criteria generally applicable to other Indians, Indian nations or tribes or bands of Indians....The Houlton Band of Maliseet Indians shall be treated in the same manner as other federally recognized tribes for the purposes of Federal taxation....

**25 U.S.C. § 1726(a):**

**(a) Appropriate instrument in writing; filing of organic governing doucment.**

The Passamaquoddy Tribe, the Penobscot Nation, and the Houlton Band of Maliseet Indians may each organize for its common welfare and adopt an appropriate instrument in writing to govern the affairs of the tribe, nation, or band when each is acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this subchapter and any amendments thereto....

**25 U.S.C. § 1727(e):**

> **(e) Indian tribe within section 1903(8) of this title; State jurisdiction over child welfare unaffected.**
>
> For the purposes of this section, the Houlton Band of Maliseet Indians is an "Indian tribe" within section 4(8) of the Act [25 U.S.C. § 1903(8)], provided, that nothing in this subsection shall alter or affect the jurisdiction of the State of Maine over child welfare matters provided in section 1725(e)(2) of this title.

**25 U.S.C. § 1735(a):**

> **(a) Law governing; special legislation.**
>
> In the event of a conflict of interpretation between the provisions of the Maine Implementing Act and this Act should emerge, the provisions of this subchapter shall govern.

**25 U.S.C. § 1721, note, § 2(b)(1) & (4) [The Federal Micmac Act of 1991]:**

> (b) Purpose. It is the purpose of this Act to–
>
> (1) provide Federal recognition of the Band;
>
> .....
>
> (4) ratify the [State] Micmac Settlement Act, which defines the relationship between the State of Maine and the Aroostook Band of Micmacs;

**25 U.S.C. § 1721, note, § 6(a) & (b):**

(a) Federal Recognition.— Federal recognition is hereby extended to the Aroostook Band of Micmacs. The Band shall be eligible to receive all the financial benefits which the United States provides to Indians and Indian tribes to the same extent, and subject to the same eligibility criteria, generally applicable to other federally recognized Indians and Indian tribes.

(b) Application of Federal Law.— For the purposes of application of Federal law, the Band and its lands shall have the same status as other tribes and their lands accorded Federal recognition under the terms of the Maine Indian Claims Settlement Act of 1980 (25 U.S.C. §§ 1721 *et seq.*).

**25 U.S.C. § 1721, note, § 7(a):**

TRIBAL ORGANIZATION

(a) In General.— The Band may organize for its common welfare and adopt an appropriate instrument in writing to govern the the affairs of the Band when acting in its governmental capacity. Such instrument and any amendments thereto must be consistent with the terms of this Act. The Band shall file with the Secretary a copy of its organic governing document and amendments thereto.

**30 MRSA § 6202 [The Maine State Implementing Act]:**

**Legislative findings and declaration of policy**

The Legislature finds and declares the following:

....

...the Passamaquoddy Tribe and the Penobscot Nation have agreed to adopt the laws of the State as their own to the extent provided in this Act. The Houlton Band of Maliseet Indians and its lands will be wholly subject to the laws of the State of Maine.

**30 MRSA § 6204:**

Except as otherwise provided in this Act, all Indians, Indian nations, and tribes and bands of Indians in the State and any lands or other natural resources owned by them, held in trust for them by the United States or by any other person or entity shall be subject to the laws of the State to the same extent as any other person or lands or other natural resources therein.

**30 MRSA § 6206.1:**

**General Powers.**

...[I]nternal tribal matters [of the Passamaquoddy Tribe and the Penobscot Nation], including membership in the respective tribe or nation, the right to reside within the respective Indian territories, tribal organization, tribal government, tribal elections and the use or disposition of settlement fund income shall not be subject to regulation by the State.